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REPORTS<sup>c</sup>  
OF  
Cases in Law and Equity  
DETERMINED IN THE  
S U P R E M E C O U R T  
OF THE  
STATE OF NEW YORK.

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BY OLIVER L. BARBOUR, LL. D.

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VOL. XXX.

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1860.

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**REPLACEMENT**

6/62

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# JUSTICES OF THE SUPREME COURT.

DURING THE YEAR 1860.

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## FIRST JUDICIAL DISTRICT.

- CLASS 1. BENJAMIN W. BONNEY.\*†  
" 2. THOMAS W. CLERKE.§  
" 3. JOSIAH SUTHERLAND.  
" 4. DANIEL P. INGRAHAM.  
" 5. WILLIAM H. LEONARD.†

## SECOND JUDICIAL DISTRICT.

- " 1. JOHN A. LOTT.\*  
" 2. JAMES EMOTT.  
" 3. JOHN W. BROWN.  
" 4. WILLIAM W. SCRUGHAM.†

## THIRD JUDICIAL DISTRICT.

- " 1. WILLIAM B. WRIGHT.§  
" 2. GEORGE GOULD.\*  
" 3. HENRY HOGEBOOM.  
" 4. RUFUS W. PECKHAM.†

## FOURTH JUDICIAL DISTRICT.

- " 1. AMAZIAH B. JAMES.\*  
" 2. ENOCH H. ROSEKRANS.  
" 3. PLATT POTTER.  
" 4. AUGUSTUS BOCKES.†

## FIFTH JUDICIAL DISTRICT.

- CLASS 1. WILLIAM J. BACON. §  
 " 2. WILLIAM F. ALLEN.\*  
 " 3. JOSEPH MULLIN.  
 " 4. LE ROY MORGAN. †

## SIXTH JUDICIAL DISTRICT.

1. CHARLES MASON.\*  
 " 2. RANSOM BALCOM.  
 " 3. WILLIAM W. CAMPBELL.  
 " 4. JOHN M. PARKER. †

## SEVENTH JUDICIAL DISTRICT.

- " 1. HENRY WELLES. §  
 " 2. ERASMUS DARWIN SMITH.\*  
 " 3. THOMAS A. JOHNSON.  
 " 4. ADDISON T. KNOX. †

## EIGHTH JUDICIAL DISTRICT.

- " 1. BENJAMIN F. GREENE.\*  
 " 2. RICHARD P. MARVIN.  
 " 3. NOAH DAVIS, JUN.  
 " 4. MARTIN GROVER. †

CHARLES G. MYERS, *Attorney General.*

\* Presiding Justice.

† Appointed by the Governor, in January, 1860, to fill the vacancy caused by the resignation of HENRY E. DAVIES.

‡ Elected in November, 1859.

§ Sitting in the Court of Appeals.

---

 ERRATA—VOL. 29.

Page 371, line 12. After "me" insert "and." Strike out the period, after "conclusions," and substitute a comma.

" 372, line 19. Strike out "argued and."

" 377, line 8. Strike out "form," and insert "power."

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CASES  
IN  
Law and Equity  
IN THE  
SUPREME COURT  
OF THE  
STATE OF NEW YORK.

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MORGAN and others *vs.* KING and others.

The provision in the constitution of 1777, declaring that such parts of the common law of England as were in force on the 19th day of April, 1775, should be and continue the law of this state, subject to alteration by the legislature, was nothing more nor less than an adoption of the *essential principles* of the common law, the application of which, to the condition of things here, often requires a modification, if not an entire change, of its rules; but which is merely the result of the application of general principles to particular facts. *Per JAMES, J.*

The principle is essentially the same, under all circumstances, but the rule, or mode, or standard, of application will vary with the facts, or the nature or character of the subject, to which the application is to be made. *Per JAMES, J.*

In adopting the common law, we have adopted its fundamental principles and modes of reasoning, and the substance of its rules, as illustrated by the reasons on which they are based, rather than by the mere words in which they are expressed. *Per JAMES, J.*

The doctrine is fully established that in fresh water rivers, where the tide does not rise, except in our large lakes and rivers forming the boundary between us and other states and nations, the ownership of the citizen is of the

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whole river—the soil and the water—subject to the servitude of the public interest or right of way. *Per JAMES, J.*

The right of public servitude, in a stream, depends not upon its navigability, in the common law sense of the term, but upon its capacity for the purposes of trade, business and commerce.

Any stream, capable of being used in the transportation of any kind of property to market—whether in boats, rafts or single pieces—whether guided by the hand of man, or floated at random on the water, is a public stream, and subject to the public easement.

Adopting that rule as a correct exposition of the common law as understood in this country, and applying it to the facts of this case, the Racket river is, and was always, a public highway. *POTTER, J.* dissented.

**A** PPEAL from a judgment. Cause tried by the court without a jury. The action was for obstructing the passage of saw logs floating in the Racket river. The plaintiffs were the owners of certain premises on the said river, on which was erected a dam and saw-mill. About two and a half miles above, the defendants owned the land on both sides of the river, on which stood a saw-mill, and across the stream a dam and boom. Both parties claimed title through the same patent from the state, granted in 1787. The patent covered the whole township, without reservation, except as to mines of gold and silver. The plaintiffs' logs were detained by the defendants' booms, which was the obstruction complained of. The court found for the plaintiffs, upon which report judgment was entered.

*Brown & Spencer*, for the plaintiffs.

*Dart & Tappan*, for the defendants.

**JAMES, J.** In this case the court reported the facts found, and the conclusions of law thereon. No exceptions were taken to the finding of facts; but the exceptions are to the conclusions of law arising upon those facts; and the single question is, has the public a right of way over the waters of the Racket river, at the place of detention; or, in other words,

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was this river, in its natural state, such a stream as was subject to the public easement.

The facts from which this question is to be determined are these: "The river is 160 miles long; from its mouth to Raymondsville, 20 miles, it is boatable, and has been declared a public highway by legislative enactment, from Raymondsville to Potsdam, 14 miles, which includes the premises of the parties; its bed rises 250 feet; the stream is rapid, rough and rocky, and upon it are twelve dams; from Potsdam to Colton, nine miles, its bed rises 400 feet; beyond Colton are lakes, and a stretch of navigable water 52 miles in length, with only one mile of rapid; the average width of the river is 18 rods; its average rise in freshets is from 3 to 3½ feet; from 1810 to 1850, saw logs, lumber and timber had been floated from two miles above Potsdam to Raymondsville, in small quantities; from Colton to Raymondsville the river, in its natural state, is not capable, at any season, of being navigated by vessels, barges, lighters or rafts; but during the seasons of high water, in each year, it has capacity for floating to market saw logs and timber in single pieces; from Raymondsville to Colton are nine saw mills in operation, some of which make 45,000 feet of lumber per day; which are, and only can be, supplied with logs by floating them down said river; this trade has mostly sprung up since 1850."

Upon these facts, the special term held "that Racket river, in its natural state, being of sufficient capacity in seasons of high water to float logs and timber to market, is a public highway at common law; that the riparian proprietors own the bed of the stream subject to the public right of easement."

The defendants' counsel claims, 1st. "That the constitution adopted in this state in 1777, expressly retained the common law of England, except as modified by statute. 2d. That the patent of the premises was issued in 1787, and unless the river was then *navigable* within the common law meaning of that term, it carried with it the bed of the stream. 3d. That the common law of England is applicable to the rivers in this

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country. 4th. That by the common law, streams which are so small, shallow or rapid, as not to afford a passage for the king's people and are not *navigable* for boats, or vessels, or rafts, are altogether private property: navigable refers to something steered or managed. 5th. That where the common law applies to a subject existing in this country, the courts can no more change it, nor disregard it, than they can a statutory enactment or constitutional provision."

It was established that the title of the defendants to their premises came through a patent granted by the state in 1787, under the constitution adopted in 1777. That constitution provided, among other things, that "Such parts of the common law of England, the statute law of England and Great Britain, and the acts of the legislature of the colony of New York, as together did form the law of said colony on the 19th day of April, 1775, should be and continue the law of the state, subject to such alterations as the legislature should make concerning the same." The patent from the state contained no reservation of any right of way, or use of the streams, and it may therefore be conceded that the right of the patentee and his grantees, whatever it be, became fixed on the delivery of the grant by the state; and that that right has not been affected by any subsequent legislative enactment. Unless the public right of servitude in the river existed at the date of the patent, it does not now; and if it did exist at that time, it was a public right; the state had no power to dispose of it; and it did not pass by the grant. (*Canal Appraisers v. The People*, 17 Wend. 624. 26 id. 404. 17 John. 195.)

The defendants' right to the bed of the river and the use of the same with the waters subject to the public easement, is conceded.

I will now proceed to consider the common law of England; its principles as applicable to this subject; how far those principles were adopted; and their application, by the courts of this and other states.

As was said by Greene, justice, in *The People v. Randolph*,

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(2 *Park. Cr. Rep.* 176,) "The common law consists of those principles and maxims, usages and rules of action, which observation and experience have commended to enlightened reason as best calculated for the government and security of persons and property. Its principles are developed by *judicial decisions as necessities arise*, from time to time, demanding the application of those principles to particular cases in the administration of justice. The authority for its rules does not depend upon positive legislative enactment, but upon the principles which they are designed to enforce—the nature of the subject to which they are to be applied, and their tendency to accomplish the ends of justice." "It follows that these rules are not arbitrary in their nature nor invariable in their application; but, from their nature, as well as the necessities in which they originate, they are, and must be, susceptible of a modified application suited to the subject upon which that application is to be made."

The principles of the common law, as its theory assumes and its history proves, are not exclusively applicable, or suited, to our country, or condition of society; but, on the contrary, by reason of its property of expansibility and flexibility, their application to many, is practicable. The adoption of the common law, in the most general terms, by the government of any country, would not necessarily require or admit of an unqualified application of all its rules, without regard to local circumstances, however well settled and generally received those rules might be. Its rules are modified upon its own principles and not in violation of them. The language of the constitutional provision above quoted is, "Such parts of the common law as were in force on the 19th day of April, 1775, shall be and continue the law of this state." What parts of that law were then in force here? None, upon the subject now under consideration, except what resulted from our colonial dependence. Upon the principles already stated, so much only of the common law was in force in the colony by virtue of that relation as was applicable to the condition of things

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here. This proposition is sustained by the highest authority. Sir William Blackstone (1 *Com. p.* 107) says, "It hath been held, that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, are immediately there in force. But this must be understood with a great many restrictions. Such colonists carry with them only *so much* of the English law as is applicable to their own situation, and *the condition of the infant colony.*" Kent (1 *Com.* 472) lays down the same rule with regard to the extent to which the common law was applicable in the colonies, and its subsequent adoption by the constitution of the several states. He says, "The common law, so far as it is applicable, has been recognized and adopted as one entire system by the constitutions of New York, Massachusetts, New Jersey and Maryland. It has been assumed by the courts of justice, or declared by statute, with the like modifications, as the law of the land. It was imported by our colonial ancestors, as far as it was applicable, and was sanctioned by royal charters and colonial statutes."

This apparently qualified adoption of the common law, is nothing more nor less than *an adoption of its essential principles*, the application of which to the condition of things in the new country often requires a modification, if not an entire change, of its rules; but which, after all, is nothing more than the result of the application of general principles to particular facts. The principle is essentially the same under all circumstances; but the rule, or mode, or standard of application, will vary with the facts, or the nature, or the character of, the subject to which the application is to be made.

Again; when it is said that we have in this country adopted the common law of England, it is not meant that we have adopted any mere formal rules, or any written code, or the mere verbiage in which the common law is expressed. It is aptly termed the *unwritten law* of England; and we have adopted it as a constantly improving *science*, rather than as an *art*; as a system of *legal logic*, rather than as a *code of rules*.

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In short, in adopting the common law, we have adopted its fundamental principles and modes of reasoning, and the substance of its rules, as illustrated by the reasons on which they are based, rather than by the mere words in which they are expressed.

As an illustration of this, some of our judges and jurists have expressed the opinion that the common law rule relative to the rights of riparian owners on rivers above the flux and reflux of the tide, does not prevail in respect to our large lakes or large navigable rivers. (3 *Kent*, 427, n. 5 *Wend.* 447. 17 *id.* 597, 621. 20 *id.* 208. 12 *Barb.* 206. 19 *id.* 484.) Such may now be regarded as the law of this state.

The *Hargrave Tracts*, or the treatise *De Jure Maris*, embodies the principles of the common law relating to the respective rights of the public or the citizen, in the sea, arms of the sea, and in salt and fresh water rivers and streams. The general distinctions thus established are, that fresh water rivers, of what kind soever, do of common right belong to the owners of the soil; yet, though of private right, may be affected by a public servitude. It says "There be some streams or rivers, that are private, not only in propriety or ownership, but also in use, as little streams and rivers, that are not of common passage for the king's people; there be other rivers, as well fresh as salt, that are of common or public use, for carriage of boats and lighters; and these are *prima facie* common highways for man, or goods, or both, from one inclosed town to another." And the doctrine is fully established, that in fresh water rivers, where the tide does not rise, except in our large lakes and rivers forming the boundary between us and other states and nations, the ownership of the citizen is of the whole river—the soil and the water—subject to the servitude of the public interest or right of way. (*Ex parte Jennings*, 6 *Cowen*, 536, and see note. 26 *Wend.* 404.)

It is therefore conceded that the principles of the common law, in relation to the question under consideration, so far as the same are applicable to the nature, character and condition

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of our fresh water streams, were in force in this state at the date of the patent under which the defendants claim.

It is the duty of the court, in this case, to apply those principles to the Racket river, and determine whether it was susceptible of such use as made it a public highway.

Its character must be determined by its capacity for public use; and the extent of capacity requisite to give the public an easement in a fresh water stream, must be ascertained by the application of the principles of the common law to the nature of the subject, and the circumstances under which that application is to be made. We are not bound to follow the letter of the common law, forgetful of its spirit; its *rule* instead of its principle. A *rule* of law applicable to the fresh water streams of England may be wholly inapplicable to fresh water streams in this country of the same nature and character, because of different capacity, or because the adjoining country may furnish a commerce for them unknown in England, and yet be subject to the same *principle*. If so, the common law modifies its rules upon its own principles, and conforms them to the wants of the community, the nature, character and capacity of the subject to which they are to be applied.

The defendants insist that, unless the Racket river was *navigable*, within the common law meaning of the term, they have the absolute fee in its bed and flow of water. Navigability is not the true test. A *navigable* river, in the common law use of the term, is one in which the tide ebbs and flows. (*Fishery of the Banne, Davies' R.* 152. *Palmer v. Mulligan*, 3 *Caines*, 318.) In *Ex parte Jennings*, (6 *Cowen*, 518,) the court say: "By the term *navigable river*, the law does not mean such as are navigable in common parlance. The term has in law a technical meaning, and applies to streams, rivers or arms of the sea, where the tide ebbs and flows."

The right of public servitude in a stream depends, not upon its navigability, in the common law sense of the term, but upon its capacity for the purposes of trade, business and com-

merce. The *Hargrave Tracts* define fresh water rivers, deemed public, to be such as float vessels, boats and lighters. Mr. Butler, in his notes (205) to *Co. Litt.*, says, a river where boats, rafts, &c. may be floated to market, is a public river.

In this country, our courts, following the principles of the common law, and adapting them to the subjects presented for their application, have recognized other and still more primitive modes of transportation as evidence of capacity.

*Putnam v. Mulligan* (3 *Caines*, 307) was an action for erecting a dam on the Hudson river at Stillwater, diverting water, &c. from the plaintiff's mill. On the trial, the point was taken that the plaintiff's mill being on a public stream was a nuisance, and no right of action existed for its obstruction, &c. On this point Justice Spencer said: "Whether the Hudson river be considered as a public highway, or the bed of it as belonging to the owners of the adjacent shores, will not, I think, vary the result. I cannot but consider it as a common highway, independent of its being navigable with small craft and rafts above the place in dispute." Justice Thompson said: "It is a fact of public notoriety that the tide does not ebb and flow as high up the Hudson river as the place in question, and therefore the land under water is as much the subject of private grant as the land adjoining the river, subject however to be used by the public for the purposes of boating and rafting, and *other objects of this description*, as far as it shall be necessary for public use and accommodation." These are the rules and distinctions adopted by *Hargrave*, and which appear just and reasonable. Chief Justice Kent, after quoting from the *Hargrave Tracts*, "that the *Wey, Severn, &c.*, as well above as below the tide, as well in the part where they are private as of public property, are public rivers, not in reference to the property of the river, but to the public use," says: "This is the true and just rule which harmonizes private right with public interest. The Hudson at Stillwater is capable of being held and enjoyed as private property; but it is notwithstanding to be deemed a

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public highway for public uses, such as that of rafting lumber," &c.

In *Shaw v. Crawford*, (10 *John*. 237,) the court say: "Where a river is so far navigable as to be of public use in the transportation of property, the public claims to such navigation ought to be liberally supported. The free use of waters which can be made subservient to commerce, has, by the general sense of mankind, been considered as a thing of common right." (See *Hooker v. Cummings*, 20 *John*. 90; *The People v. Platt*, 17 *id.* 211.)

In *Browne v. Scofield*, (8 *Barb.* 239, 243,) Johnson, justice, says: "That this river (Canisteo) was a public highway at common law, as it has always been understood and applied in this country, is abundantly established by the evidence. Not only in this state, but in all our sister states, these great natural channels and avenues of commerce, wherever they are found of sufficient capacity to float the products of the mines, the forest, or the tillage of the country through which they flow, to market, have always been adjudged by our courts to be subject to the right of passage, independent of legislation."

So in *Maine*. The court, in *Browne v. Chadbourn*, (31 *Maine Rep.* 9,) held that, "if a fresh water stream is inherently and in its nature capable of being used for the purposes of commerce, or for the floating of vessels, boats, rafts or logs, it may be so used by the public, leaving to the owners of the bed all other modes of use not inconsistent with this easement." "And the stream need not be capable of such use during the whole year. So that a stream not containing sufficient water, in its ordinary state, for the floating of logs, may yet be used by the public for that purpose whenever its condition admits."

1st. The rule to be deduced from these authorities is, that any stream capable of being used in the transportation of any kind of property to market—whether in boats, rafts or single pieces—whether guided by the hand of man or floated at ran-

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dom on the water, is a public stream, and subject to the public easement.

2d. Adopting the rule thus laid down as a correct exposition of the common law as understood in this country, and applying that rule to the facts of this case, the Racket river is, and was always, a public highway.

3d. The facts show that upon this stream there is an immense commerce in saw logs and manufactured lumber; that this river, in its natural state, at the place of obstruction, has ample capacity to transport that commerce to market in a cheap and expeditious mode. It is not necessary that that commerce should be transported in crafts or rafts that can be guided by the hand of man. The test of capacity is not alone in the nature or character of the craft, nor how guided, or whether guided at all. If it has capacity sufficient to transport to market the whole, or a part, of the commerce, no matter of what particular character, that grows or gathers upon its banks, it is subject to the public servitude. If it can do this, to that extent it is a public highway, within the principles of the common law.

If, in course of time, the particular commerce which alone it is capable of bearing, ceases to gather upon its banks, then will cease the public use of the river as a highway.

It was also argued that the construction contended for by the plaintiff, if adopted, would "convert every private mill stream, creek, rivulet or ravine, which passes the surface flood at spring freshets, into a public highway." I do not anticipate any such result. If any such mill stream, creek, rivulet or ravine has sufficient capacity to transport on its surface the products growing upon its banks to market, it would, and of right ought to be, a public highway, but not otherwise. But there is such a vast difference between a stream 160 miles long, 18 rods wide, with 70 miles of navigation upon it, and private mill streams, creeks, rivulets and ravines, that the correct application of a principle to one will furnish no precedent for the misapplication of that principle to the other.

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The fact was fully established, that Racket river, in its natural state, at certain seasons of the year and in a certain way, had capacity, and was susceptible of, public use, in transporting to market certain products of the country through which it passed; having such capacity and adaptability, it was, according to the principles of the common law as applied in this country, a public highway.

The judgment should therefore be affirmed.

C. L. ALLEN, J., concurred.

POTTER, J., dissented.

Judgment affirmed.

[WARREN GENERAL TERM, July 18, 1858. C. L. Allen, James and Potter, Justices.]

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 UTTER vs. STUART.

*See Linsley*  
*6 N.Y. 552*  
 In all cases where a party, having it in his power, cancels a contract, or declares it void, he should restore the other party to his former right, by repayment of money, or return of property, received on such contract; and failing to do so, he is liable to an action for its recovery.

Where a vendor, in pursuance of a right reserved in the contract of sale, declares the contract void, and re-enters and takes possession of the lands, and sells the same to another person, this amounts to a rescission of the contract by him, and the vendee may, in an action for money had and received, recover back the payments made by him.

THIS was an action by a purchaser, to recover back from a vendor moneys paid by the former upon a contract between the parties for the sale and purchase of land.

*Morris & Vary*, for the plaintiff.

*Aikens Foster*, for the defendant.

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JAMES, J. The plaintiff sets forth in his complaint that on the 25th of January, 1854, he entered into a written agreement with the defendant for the purchase of a lot of land, he to pay therefor \$300 and interest, \$25 at date, \$75 at four months, and the balance in one and two years thereafter; that he made the first and second payments, and part of the third; that in June, 1857, he offered to pay the balance, which was declined; that he thereupon tendered the balance and a deed, and demanded its execution, which was also refused, for the reason, as alleged, that the defendant had sold and conveyed the land to another. The plaintiff then demanded a return of the money paid, which was also refused; wherefore judgment for the money advanced is demanded.

The answer admits the agreement as set forth in the complaint, the payments to the amount of \$158, and denies all the other allegations. It then sets up as a defense, that until the last payment became due, the defendant was ready and willing to perform said agreement, but the plaintiff neglected to perform the same on his part; that thereupon the said defendant elected to consider the contract absolutely void, &c.

On the trial, the proofs showed the payment of the first and second installments, and \$58 on the third, in all \$158; also the offer, tender, demands and refusals, as alleged in the complaint. It further appeared that on the execution of the agreement, the plaintiff was let into possession of the premises, and so continued until April, 1857. In May, 1855, the plaintiff left the country, and remained absent until June, 1857; that the defendant made diligent inquiry and search for the plaintiff, but was unable to find him or learn his whereabouts. In April, 1857, the defendant went on to the premises, and demanded the money due and unpaid on said contract, and then and there declared the said contract void, and thereupon re-entered and took possession of said land. In the winter of 1857 the defendant negotiated for the resale of the premises, and on the 15th of June, 1857, sold and conveyed the same. It also appeared in proof that at all times

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previous to the 15th June, 1857, the defendant was ready and willing to fulfill and perform said agreement.

Besides the usual, ordinary and necessary provisions of a land contract, the instrument executed by these parties contained these provisions: "Provided always, and these presents are upon this express condition, that in case of default of the said party of the second part, &c. in the performance of any or either of the covenants on his part to be performed, it shall and may be optional with the said party of the first part to abide by this contract, or consider it absolutely void. He may re-enter and dispose of the premises, &c., and the said party of the first part shall have the right at any time to recover the interest that may be due upon this contract for the period of actual possession, as rent for the use and occupation of the premises."

The last payment became due, by the terms of the agreement, on the 25th day of May, 1856; but the agreement was not declared void until April, 1857. Therefore, at the time of this declaration, the legal right to declare the contract forfeited for non-performance existed, independent of the clause in the contract reserving the right to declare it void in case of non-performance.

Had the defendant seen fit to exercise the right of forfeiture, or had he placed his defense upon that ground, and relied upon the sale and conveyance, as evidence of that fact, it is certain that the plaintiff could not have maintained this action. But the defendant, both in his answer and in his proof, places himself upon the right reserved in the contract; and that, as we have seen, was a right to declare the contract void in a certain contingency, and which contingency having happened, the defendant availed himself of.

The plaintiff insists that the defendant, under the power vested in him by the instrument itself, having declared the contract void, it is void *ab initio*, that is, as though no contract had ever existed. In other words, that the acts of the defendant were a rescission, and that the plaintiff may recover

back money paid by him on such agreement, as for money had and received.

The defendant's counsel insists that such is not the fair construction of that clause of the agreement; that the meaning of the parties was that the defendant, upon the plaintiff's default, might be, and consider himself to be, released from the obligation of the contract—might consider it, so far as his promise was concerned, *thenceforth void*, not void *ab initio*.

I am of the opinion that the act of the defendant, being as it was exclusively under the authority reserved to him by the contract, must be regarded as a rescission of the agreement. If I am correct in this, then the right of the plaintiff to recover back the payment made, in an action for money had and received, is undoubted. (*Raymond v. Bearnard*, 12 *John. R.* 274. *Id.* 363. *Green v. Green*, 9 *Cowen*, 46. *Battle v. Rochester City Bank*, 4 *Comst.* 91.

In all cases where a party, having it in his power, cancels a contract, or declares it void, he should restore the other party to his former right, by repayment of money, or return of property, received on such contract; and failing to do so, he is liable to an action for its recovery. (*Penny v. Cameron*, 1 *Greene's (Iowa) Rep.* 380. 6 *Gill & John.* 424. 15 *Mass. Rep.* 319. 26 *Verm. Rep.* 476.)

The plaintiff is therefore entitled to recover in this action the amount of the money paid, less the price agreed for the rent of the premises.

THE PEOPLE OF THE STATE OF NEW YORK, by their Attorney General, *vs.* JAMES BOWEN and others.

The governor may approve and sign a bill after the adjournment of the legislature, so as to render the same valid and binding as a law.

The act of the legislature, entitled "An act to incorporate the Metropolitan Gas Light Company of the City of New York," passed April 17, 1855, creating a corporation with authority to lay their pipes in the streets &c., for the purpose of conducting gas &c., upon their obtaining the permission of the two boards of the common council, was not unconstitutional and void, either because it established a monopoly in the trade or business of supplying gas within the city of New York; or because it took, for the use of the gas company, the streets or easements or privileges in the streets of the city, being the property of the corporation of the city, without making or providing for compensation to the city, and without the consent of the corporation of the city; or as coming within the constitutional prohibition against the creation of corporations by special acts.

The ninth section of that act, by which it is provided that "the said company shall be deemed to be organized when the president shall be elected, and shall be deemed to be in practical operation from the time the permission and authority provided for in the first section is obtained," was intended to relieve, and did relieve, the corporation from the provision of the revised statutes requiring corporations to organize and commence the transaction of their business within a year.

**D**EMURRER to complaint. The opinion of the court contains a statement of the facts stated in the complaint, and of the legal questions raised by the demurrer thereto.

*Monell, Willard & Anderson*, and *Wm. M. Evarts*, for the plaintiffs.

*M. S. Bidwell, E. P. Cowles* and *W. Hutchins*, for the defendants.

**SUTHERLAND, J.** This is an action in the nature of a *quo warranto*, against the defendants, for assuming to be, and acting as a corporation, without authority of law. The complaint alleges that the defendants have associated themselves together and claim to be a corporation, and are unlawfully acting as a corporation, under an alleged act of the legislature of the state

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of New York, entitled "An act to incorporate the Metropolitan Gas Light Company of the City of New York," passed April 17, 1855; but further alleges, that although the bill of said alleged act passed the assembly on the 5th day of April, 1855, and the senate on the 13th day of April, 1855, yet it was not approved of, or signed by the governor, until the 17th day of April, 1855; and that the legislature adjourned without day on the 14th day of April, 1855, and was never thereafter in session during that year. By an averment of the complaint, the act in question (*Sess. Laws of 1855, p. 1039*) is made a part of the complaint.

By section one of the act, James Bowen and others, (the defendants in this action,) and their present and future associates, are created, constituted and declared to be a body corporate and politic, by the name of "The Metropolitan Gas Light Company of the City of New York," with authority to lay their pipes in the streets &c., for the purpose of conducting gas, &c.; but this can only be done upon obtaining the permission of the two boards of the common council of said city. The complaint further alleges, that in the month of June, 1855, the defendants, pretending to act as a corporation, under the name of "The Metropolitan Gas Light Company of the City of New York," presented their petition to the board of councilmen of the city of New York, praying for permission to lay conductors through the streets &c., for the purpose of conducting gas through the same. That on the 12th day of September of the same year, the board of councilmen passed a resolution granting such permission, but that on the 8th day of December, 1856, the board of aldermen non-concurred, and the resolution was lost. That on the 20th day of December, 1858, the said board of councilmen passed a resolution granting such permission, which resolution is set out in the complaint, and that such resolution was concurred in by the board of aldermen on the 27th day of December, 1858.

The complaint insists that the defendants and their asso-

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ciates are not a corporation, and have no right to act and assume the franchises of a corporation :

*First.* Because the act of incorporation was not approved by the governor until after the adjournment of the legislature, and for this reason failed to become a law.

*Second.* That, if approved by the governor so as to be a law, the act is unconstitutional and void in its purposes and provisions.

*Third.* That the said corporation did not commence the transaction of its business within one year from the date of its incorporation, and has not yet commenced the transaction of its business, and that thereby its corporate powers (if it ever had any) have ceased. The prayer for relief is, that the act may be adjudged to be in violation of the constitution of this state, and null and void ; and that the defendants may be adjudged to unlawfully assume and usurp the franchises of being a corporation, and to act as a corporation without legal authority or right.

To this complaint the defendants have demurred generally, on the ground that the complaint does not state facts sufficient to constitute a cause of action. From this statement it will be seen that three questions are raised by the demurrer :

*First.* Can the governor approve and sign a bill, so as to make it a law, after the final adjournment of the legislature ?

*Second.* Is the act in question unconstitutional and void, if duly passed and approved by the governor so as to make it a law if otherwise constitutional ?

*Third.* Does the act in question contain any special provision or provisions, which relieve the corporation, thereby intended to be created, from the provision of the revised statutes, (1 R. S. 600, § 7,) requiring corporations thereafter created, to organize and commence the transaction of their business within one year from the date of their incorporation ; or if created subject to this provision of the revised statutes, did this corporation in fact commence the transaction of its business within one year from the date of its incorporation ? Can a bill

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passed by a majority merely, become a law by the approval and signature of the governor, after the adjournment of the legislature; or, to become a law, must it have such approval and signature during the session of the legislature?

By section 1 of article 3 of the constitution, it is provided that "the legislative power of this state shall be vested in a senate and assembly." By section 14 of the same article the enacting clause of all bills shall be, "The people of the state of New York, represented in senate and assembly, do enact as follows." And no law shall be enacted except by bill. By section 15 of the same article, "No bill shall be passed unless by a majority of all the members elected to each branch of the legislature, and the question upon the final passage shall be taken immediately upon its last reading, and the yeas and nays entered on the journal." By section 9 of article 4, it is provided "that every bill, which shall have passed the senate and assembly, shall, before it becomes a law, be presented to the governor. If he approves, he shall sign it; but if not, he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objection at large on their journal, and proceed to reconsider it. If, after such reconsideration, two-thirds of the members present shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and, if approved by two-thirds of all the members present, it shall become a law, notwithstanding the objections of the governor. But, in all such cases, the votes of both houses shall be determined by yeas and nays; and the names of the members voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the governor within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the legislature shall, by their adjournment, prevent its return, in which case it shall not be a law."

These provisions amount to a constitutional definition, and

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the result is, I think, that the governor may approve and sign a bill after the adjournment of the legislature, so that the bill which otherwise would not be a law, becomes a law by his approval and signature. The constitution makes the distinction between a bill and a law; it defines the legislative power to be the power to pass bills subject to the qualified negative of the governor; it carefully separates the legislative from the executive power, and carefully excludes the executive power or right of approving or objecting to the bill from the legislative power. By the constitution, this power of approval and of objection is not a legislative, but an executive revisory act, implying in its exercise time, examination, judgment. I think that from the careful exclusion of this revisory right or power by constitutional definition from the legislative powers, and from the general provision in the ninth section of article four, that "every bill that shall have passed the senate and assembly shall, before it becomes a law, be presented to the governor—if he approve, he shall sign it," without the specification of any time or period for the performance of this executive act or duty, it follows that a bill may become a law by the executive approval and signature after the adjournment of the legislature.

By the ninth section, every bill shall be presented to the governor for his approval or objections; and there are two ways in which the bill may become a law during the session of the legislature—with his approval and without his approval. If he signs the bill, his signature is evidence of his approval; if he retains the bill ten days without returning it, &c., "the same shall become a law in like manner as if he had signed it;" that is, you may say, that the constitution makes such retention for ten days, evidence of his approval; but the legislature may adjourn before the expiration of the ten days, and thus prevent the return of the bill; in which case, says the constitution, "it (that is, any bill which shall not have been returned by the governor to the legislature before their adjournment) shall not be a law;" that is, by the governor's retention of it

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for ten days, or "in like manner as if he had signed," or, in other words, without his signature. If the governor approve and sign the bill after the adjournment of the legislature, their adjournment did not prevent the return of it. Does it follow, because a bill cannot, after the adjournment of the legislature, become a law without the signature of the governor, that it cannot with his signature? In case the governor approve the bill, what relieves him from the plain injunction of the constitution, that if he approve the bill, "he shall sign it?" This right and power of approval or of disapproval is discretionary, free, and entirely without constitutional limitation or control; but every bill shall be presented to the governor, and it is plainly his constitutional duty to examine every bill; such an examination implies an approval or disapproval; if he approves, "he shall sign it." What is there in the constitution, relieving the governor from his general duty of examining every bill passed, or which limits his exercise in point of time to the actual session of the legislature? I see nothing.

All public officers, and all departments of government, are to be presumed to act from public motives, and within the sphere of their constitutional duties; all bills passed by the legislature, therefore, are to be presumed to be constitutional and for the public good; they might not be—hence the veto check; but if a law authorized by the constitution is called for by the public interest, why should not the bill embodying it, approved of by the governor, become a law by his signature, although the legislature may have adjourned without giving him time for examination? Why should the adjournment of the legislature deprive the public of the law? the governor being always at hand to examine, and, if he approves, to sign. "Every bill which shall have passed the senate and assembly, shall, before it becomes a law, be presented to the governor; if he approves, he shall sign it," says the first part of section nine of article four. The remainder of the section is a provision for the contingency of his not approving the bill. The veto power calls for time and examination. The legislature

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have a right to make the bill a law, notwithstanding the objections. The legislature cannot exercise this right without being in session. There should be no unnecessary delay in passing laws. The ten days for the return of the bill is fixed by this section, with reference to all these considerations. The requirement that the bill shall be returned to the house in which it originated, with the objections, is for the benefit of the legislature, and in furtherance of their right to re-pass the bill by a two-third vote; and if they choose to adjourn, and waive this right, before the expiration of the ten days, why should that affect the general right and duty of the governor to sign all bills which he approves? The statement of his objections is for the benefit of the legislature; and, therefore, after they have adjourned, if the governor does not approve the bill, he simply abstains from putting his name to it.

Conceding the construction of these provisions of the constitution to be doubtful, so that considerations of public convenience or public policy can properly be resorted to, I am of the opinion that the strength of the argument, drawn from such considerations, is decidedly in favor of the construction giving the right in question to the governor. It is said, if the governor can sign bills after the adjournment of the legislature, to which the constitutional limitation of ten days does not apply, there being no time fixed for his examination or signature, if he approves, that he might sign at any time during the interval between the adjournment and the next session, or even at any time during his term of office. To this I answer that, the legislature having adjourned, there was no need of fixing a time as to them; and as to the public at large, whether the bill becomes a law depends entirely upon the governor's signature; whether he shall or shall not approve and sign, is wholly at his discretion. Is it extraordinary that the constitution, leaving the fate of the bill after the adjournment of the legislature wholly at the discretion of the governor, should also leave somewhat at his discretion the time at or within which such discretion is to be exercised?

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I say somewhat at his discretion, because there is necessarily implied in the constitutional enjoinder of every public official duty, without express limitation as to time, an injunction and a constitutional responsibility for its performance, as soon as the occasion for the performance arises, and the nature of the duty and other duties of equal importance will permit. What executive duty is more momentous than the examination, judgment and conclusion implied in the exercise of this revisory veto power; and if the legislature adjourns, leaving bills, under the provisions of the constitution, wholly at the executive discretion, what duty should or is more likely sooner to claim his attention? What motive, except what may be called "*vis inertiae*," has the governor for delay? Men are generally willing to do what they approve of. If the governor approves the bill, why should he delay signing it? If he does not approve, he will leave the bill unsigned, without any other constitutional accountability for his determination to sign or not to sign, than attaches to every other executive act or determination, to wit, for the honesty of its motive.

There being, therefore, no motive for unnecessary delay, the framers of the constitution did not apprehend any public inconvenience from delay in the executive action after the adjournment of the legislature; nor do I see any risk of any other or further delay than might arise from averseness to undertake the labor of examination, and the pressure of other executive duties; and this, it was probably thought, could not be provided against by an express limitation, without unnecessarily (after the adjournment of the legislature) circumscribing executive discretion. This, I think, is a sufficient answer to the only argument which I have seen, founded on considerations of public convenience or policy, against the construction, giving the governor the power in question.

Now, let us look on the other side of this question of public convenience or public policy. The provisions in the first constitution of this state, adopted in 1777, before the adoption

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of the constitution of the United States, by which this veto check upon legislation was given to the chancellor, the judges of the supreme court, together with the governor, as a council of revision, that (as expressed in the constitution) "laws inconsistent with the spirit of this constitution, or with the public good," might not be "hastily and unadvisedly" passed; and in the place of which the present provision giving this veto power to the governor alone, was first adopted from the constitution of the United States into the state constitution of 1821; and the proceedings of the convention which framed the constitution of the United States, and the debates on that constitution in the convention framing it, and in the state conventions adopting it; conclusively show that this veto check, as we have it now in the state constitution of 1846, is and was intended to be a revisory power and duty, necessarily implying in its faithful, conscientious and momentous exercise and discharge, time, investigation and judgment. From these written constitutions themselves, as well as from the proceedings of the conventions framing them, and the debates on them, it is plain that the three great departments of government, or political power, the legislative, executive and judicial, were not only intended to be checks upon each other, but to be as independent of each other as possible. The history of the constitution of the United States shows that many of the greatest and *best* men taking part in the conventions framing and adopting it, and others of that day, feared that, notwithstanding the constitutional checks upon the legislative power, it would in the end become tyrannical and oppressive, and "swallow up (as expressed on one occasion) all the other departments of government."

Their recent experience of parliamentary omnipotence and oppression had shown them that tyranny was not the less tyranny for having a hundred heads. It is plain that in this country all political liberty depends upon the integrity of our written constitutions; and without reference to the past, or recent experience, it is equally plain that a fanatical, partisan,

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log-rolling congressional or legislative majority might pass bills, not from public motives or for the public good, but from personal selfish motives, or for partizan or bigoted purposes, and which, although strictly within the constitutional limitations of legislative power, might be unnecessary and oppressive and unjust to the minority. The framers of these written constitutions thought so, and hence this great conservative and protective veto check. And from the origin and very nature of these written constitutions, this veto power, although conservative, is an equally popular representative element of the government with the legislative power. The constitution is the written will of the people; its protection is the protection of *their* government; the governor is elected directly by the people, and returns to them, and, in the exercise of the veto power, represents and acts for the people of the whole state. It is not like the veto of the English crown, left in the crown for the protection of the prerogatives of the crown, or the individual liberty of the monarch, but is more like the veto of the magistrates called tribunes among the Romans, which was given to them, and which on their first institution was used by them to protect the liberties of the people. Now, such being the origin, nature and purpose of this veto power, which construction of the constitutional provision giving it to the governor, is most commended by public policy, or public convenience, or even popular liberty properly understood—that which compels its exercise by the governor during the tumults, confusion, lobby appliances and haste of the close of the session, embarrassed and hesitating between an earnest wish not to defeat any good bill, an honest determination to veto all corrupt or unconstitutional bills, and want of time to examine all the bills, which an adjournment momentarily expected, and which may come at any time without notice, may leave in his hands; or that which, following the spirit and purpose of the ten days' limitation for keeping a bill during the session of the legislature, gives him sufficient time for the faithful and conscientious exercise of this great conservative

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power and duty? Even with an honest and pure legislative majority, is there more danger from delays than from haste in legislation? I think not. We know that the legislature might, if they never have, under a specious title, and under a mass of legislative verbiage, conceal the most dangerous attack upon the constitution, or the most corrupt private individual purpose. It would be the duty of the governor, in the exercise of this veto power, to ferret out the attack upon the constitution, and to unfold the folds of iniquity contained in the bill. This duty would require time and deliberation, and the construction claimed for the provision of the constitution in question by the attorney general might, I think, interfere with its faithful discharge.

The argument, from the supposed analogy between the English constitution and ours, has, I think, but very little force. By the English constitution, the king is a constituent part of parliament; and from the very origin of the English constitution, as it now is, it follows that he must be so. By the feudal law, proprietorship conferred jurisdiction, and by the feudal law, as introduced into England, the king was deemed to have the proprietorship, or "*jus proprietatis*," as distinguished from the use and occupation, or the right of use and occupation, of all the lands in England. Hence, by the theory of the English constitution, the king is not only the fountain of all justice, but also of all legislation. The history of parliament shows that the ancient method of passing laws was by petition and answer; and that the acts of parliament, or the tenor of them, were published by regal proclamation. The history of English liberty shows that almost all its guarantees, in the form of statutes or otherwise, like sparks from the flint and the steel, have been struck from the crown, by collisions between the barons, or the people, and the crown; and that the veto power has been (as I have before expressed it) left in the crown for the protection of its prerogatives.

The tyranny of the English parliament, and our revolution, wrought out and gave vitality to, if they did not originate a

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new principle of political jurisdiction, to wit, the right of the people to make their own governments; and the results were, written constitutions, granting even limited legislative powers, subject to the qualified negative of the executive, not as a constituent part or branch of the legislature, but as an independent executive act, for the protection of the people and of their constitutions. Besides, as by the English constitution, it is a prerogative of the king to convoke and prorogue parliament, he can at all times take sufficient time for the considerate exercise of his veto power. It would appear, however, that the king generally has power through his ministers or by the creation of peers, to defeat a bill without the responsibility of a veto, for I believe there has not been an instance of its exercise since 1692.

The practice at Washington has been, I believe, for the president not to sign bills or resolutions after the adjournment of congress; but the practice of some of the governors of this state has been different. How long or to what extent it has been the practice for the governors of the state to sign bills after the adjournment of the legislature, I have not the means of ascertaining; but it would appear that of the bills passed at the session of 1855, when the act in question in this case was passed, no fewer than fifty-five received the signature of the governor after the adjournment of the legislature; and in view of the magnitude of the interest involved, I should hesitate to consider the practice at Washington of controlling weight, did I deem the question more doubtful than I think it to be from the constitutional provision itself. It is not extraordinary that the national executive, if he had the least doubt of his right to sign a bill after the adjournment of congress, should have been very careful, even at his personal inconvenience, to sign all bills which he did approve, before the adjournment. Upon the whole, I think the act in question became a law, although signed by the governor after the adjournment of the legislature.

But it is insisted that if the alleged act has the authenti-

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city of legislation, it is void as unconstitutional; and whether it is so, is the second question raised by the demurrer in this case. It is insisted that it is unconstitutional:

*First.* Because it establishes a monopoly in the trade or business of supplying gas within the city of New York, and is within the constitutional legislative prohibition, that "no member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers."

*Second.* Because it takes for the uses of the gas company the streets, or easements, or privileges in the streets of the city, being the property of the corporation of the city of New York, without making or providing for compensation to the city, and without the consent of the corporation of the city.

*Third.* Because the constitution (*Art. 8, § 1,*) has specifically prohibited the creation of corporations by special acts, except in cases where "the object of the corporation cannot be attained under general laws," and the object of this corporation being to make gas for the purpose of lighting streets, &c. and buildings in the city of New York, this whole object was attainable under a general law passed by the legislature in 1848. (*Laws of 1848, ch. 37, p. 48.*)

As to the first objection to the constitutionality of the act, it is insisted that the monopoly complained of arises from the authority given by the act to the two boards of the common council of the city of New York, "to grant and vest *exclusive permission and authority* to and in said company," for certain purposes. It is not necessary to inquire whether, irrespective of the express constitutional provision above quoted, prohibiting legislation against vested rights, there is any other or further prohibition of monopolies implied from the form of the government or from certain great principles of justice and equality upon which the constitution was founded, and supposed to have been taken for granted by it; for I think that in this case the only semblance of an argument that the act creates, or authorizes a monopoly, or wrongfully affects vested

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rights or privileges, is founded on an erroneous construction of the act. The first section of the act, after creating and declaring the defendants and their associates to be a body politic and corporate, with the power to manufacture and sell gas, to be made of coal or other materials, for the purpose of lighting the streets and buildings in the city of New York, and to lay pipes for the purpose of conducting gas in any of the streets, &c. of the city, and to adopt any other necessary means to furnish gas to any inhabitant of the city, declares "that no public street, avenue, &c. in the said city, shall be dug into or defaced, &c., without the permission of the two boards of the common council of the said city first had and obtained; and the said boards are hereby authorized to grant and vest exclusive permission and authority to and in said company for said purpose, to such an extent, and under such regulations as to them shall seem expedient; and such permission and authority shall be conclusive, and shall continue as thus fixed during the period designated by said boards at the time of granting the same. But the rights and privileges hereby granted shall not be construed to affect or impair any exclusive rights or privileges vested in any incorporated company in said city." Now I think the exclusive permission and authority here authorized, relate simply to laying pipes, &c. in the streets of the city, and to digging into or defacing the streets, &c. for that purpose; whereas the counsel for the plaintiffs appear to think that the act authorizes the two boards to grant to the company the exclusive right of furnishing or selling gas made in any way or by any means; so that a citizen could not, after the grant of such exclusive privilege, make his own gas, on his own premises, and no other citizen or person could lawfully furnish him with gas made in portable machines and conducted without pipes in the streets, or without using the streets at all. If the authority to make the exclusive grant refers only to the use of the streets, and to the right of their use for the purpose of laying and repairing gas pipes, then it is very clear that had the two boards made their

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grant of such permission and authority exclusive, and were the defendants about to act under such exclusive grant, whether they would have a right so to act, would be a question entirely between them and the city corporation, or the persons in whom the title of the streets was, if not in the corporation; and that in this action, in the nature of a *quo warranto* to declare the act of incorporation null and void, the attorney general has nothing whatever to do with that question. The legislature, without reference to the special provision of the constitution prohibiting special acts of incorporation in certain cases, certainly had a right to incorporate the defendants for the purpose of making gas and furnishing it to the citizens. Whether the corporation can do so without using the streets of the city, or whether the two boards of the common council have or have not a right to grant the use, or the exclusive use of the streets for the purpose, are all questions in no way affecting the constitutional right of the legislature to incorporate the defendants for the purpose of making and furnishing gas, &c., and are, in fact, in no way involved in the judgment asked for in this action. This I deem a sufficient answer in this case to the first objection to the act, on the ground of its unconstitutionality; but I will add, that the resolution of the two boards of the common council granting permission to the defendants to use the streets, &c. is set out in the complaint, and that it contains a simple permission to lay pipes for the purpose of conducting gas through the streets, &c. for the period of thirty years, subject to the same restrictions as to the mode of laying down the conductors, as apply to and govern the New York and Manhattan Gas Light Company. There is nothing exclusive in the permission, not even an assurance or guarantee, that the like permission would not be given to another company, or to an individual, the next day. Now, how can the attorney general, in behalf of the state in this action, urge that the legislature had no right to grant to the two boards an authority which the defendants were not able to avail themselves of, or

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which they did not think proper to avail themselves of, if they could have done so?

As to the second objection to the constitutionality of the act, that it takes for the uses of the company, the streets, &c., being the property of the city corporation, without compensation to or the consent of the city corporation, I think it has been sufficiently answered in answering the first constitutional objection; but I will add, that the act itself certainly does not work this alleged violation of the constitution, and that when the defendants shall undertake to act under the permission granted to them by the two boards of the common council, and the city corporation is before us as a complainant, it will be time enough to examine and decide whether the two boards alone could give the permission, and whether it authorized the act, or threatened act under it. I do not think the attorney general has a right to raise this objection in this action.

As to the third and last objection to the constitutionality of the act—that the legislature were prohibited by the constitution from passing it, because the objects of the corporation could have been attained under the general act—the answer to it is, that the provision of the constitution containing this prohibition would seem, in express terms, to leave it to the legislature to decide whether the objects of a corporation can or cannot be attained under a general law; and it has been held in two cases, (*Mosier v. Hilton*, 15 Barb. 657, and *United States Trust Co. v. Brady*, 20 *id.* 119,) that whether a special act of incorporation is necessary or not, is a matter entirely for the judgment and discretion of the legislature. The last case, it is said, has been affirmed by the court of appeals, though not reported.

The third and only remaining question in this case, whether this corporation was subject to the provision of the revised statutes, requiring corporations to organize and commence the transaction of their business within a year, or, if it was, whether it did organize and commence the transaction of its business within the year, is in a nut-shell. The 9th section

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of the act is as follows: "The said company shall be deemed to be organized when the president shall be elected, and shall be deemed to be in practical operation from the time the permission and authority provided for in the first section is obtained." I am of the opinion that this section was intended to relieve, and does relieve, this corporation from the provision of the revised statutes above referred to. I can see no other purpose for this extraordinary provision.

It is argued on the part of the people that this corporation, under the provision of the revised statutes, were obliged to obtain the permission and authority provided for in the first section of the act within the year; that this 9th section, declaring that the company should be deemed to be in practical operation from the time of such permission and authority, by holding, with reference to both statutory provisions, that the permission and authority should have been obtained within the year, effect would be given to both statutes. This argument admits, what indeed follows from the express words of the 9th section, that if the permission and authority had been obtained within the year, the company would have been entirely relieved from the obligation of the revised statutes, and could, in fact, have commenced practical operations at any time thereafter. It appears to me that this argument stultifies the legislature. What could have been the object in compelling the company to obtain the permission and authority within the year, and then permit them, after obtaining such permission and authority, to rest upon their mere corporate rights for any number of years, without, in fact, doing any other or further thing? This construction, while it puts the defendants technically within the provision of the revised statutes, for the purpose of a forfeiture of their corporate rights, leaves them outside of, and unaffected by, and relieved from the whole policy and beneficial purpose and operation of the provision of the revised statutes. Had the defendants obtained the permission and authority within the year, they would have been, on obtaining the same, in reference to the •

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purpose and business of their incorporation, and the policy of the general law of the revised statutes, in precisely the same position as they would have been at the date of their incorporation, had neither the object and business of their incorporation, nor the act, required them to obtain such permission and authority, or permission and authority from any one before going into operation.

I cannot concur in the view of the question presented on the part of the people. I suppose the applicants for this special act of incorporation thought, and that the legislature thought, that the corporation might not be able to obtain the permission and authority within the year, and that this special provision, in its special act, was put in it with reference to the general law in the revised statutes, and for the purpose of relieving the defendants from it. It may be that this special provision of the act made it a proper subject to illustrate the value of an executive veto power; but with that I have nothing to do. It was plainly within the power of the legislature, entirely, to relieve the defendants from the penal provision of the general law, and I think they intended to do so by the special provision in their special act. But, suppose it is not so; and that effect can be given and should be given to the general provision, and the special provision both. The special provision of the act declares that the company shall be deemed to be in practical operation from the time the permission and authority is obtained. Then why was not the application of the defendants, as a corporation, by petition to the board of councilmen, in June, 1855, alleged in the complaint, the commencement of the transaction of its business within the provisions of the revised statutes? As the legislature had seen fit to do so absurd a thing as to declare, in effect, that the obtaining the permission and authority should be deemed the business for which the defendants were incorporated, I do not see why the court must not hold, that the application by the corporation for the permission and authority in 1855, and the

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proceedings of the two boards thereon, alleged in the complaint, were not a commencement of its business.

It is not alleged in the complaint that the company did not elect a president within the year, and therefore it must be assumed that it was organized within the year by the election of a president, within section nine of the act.

Upon all the questions raised by the demurrer in this case, my conclusion is, that the defendants must have judgment on the demurrer with costs.

[NEW YORK SPECIAL TERM, July 22, 1859. *Sutherland*, Justice.]

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TOMLINSON vs. BORST.

To render books of account competent evidence, the party must prove that during the period the charges were made, he had no clerk; that some of the articles or work were delivered or performed; that the books are the account books of the party, and that he keeps correct accounts.

The statute allowing parties to be witnesses, has not abrogated the law admitting books of account as evidence, under the rules formerly settled.

Where a plaintiff offers his books of account as evidence in support of his claim, the defendant will not be permitted to prove the general moral character of the plaintiff to be bad, for the purpose of discrediting such books.

**A**PPEAL from a judgment of the Montgomery county court, affirming a judgment of a justice of the peace. The action was for work, labor, services done, and materials found, as a blacksmith; and for window-glass bought, furnished and put in shop, at the defendant's request. Answer, denying the complaint.

On the trial, the plaintiff, after proving that he kept no clerk; a delivery of part of the articles; performance of a part of the work; that he kept fair and honest books, by those who had dealt and settled with him; and that certain books produced were his account books; offered the same in evidence, which were objected to, on the ground that they were not evidence, if all the items could be proved by other witnesses;

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which objection was overruled, and the defendant excepted. The books were then read in evidence. The plaintiff having rested, the defendant called and had sworn a witness, of whom he inquired what had been the general moral character of the plaintiff, during the period of the account claimed against the defendant. This question was objected to as immaterial, irrelevant and incompetent. The objection was entertained, and the defendant excepted. The defendant then offered to show that the plaintiff now is, and for ten years last past has been, a man of bad moral character. Same objection, ruling and exception. Judgment was rendered for the plaintiff for \$12.89 damages, and \$5 costs.

*T. R. Horton*, for the plaintiff.

*R. H. Cushney*, for the defendant.

*By the Court*, JAMES, J. The counsel for the respective parties agree that there are four questions presented on this appeal for the consideration of the court, viz:

1. Were the plaintiff's books of account properly received in evidence by the court below?
2. Did the justice err in refusing to allow the defendant to prove the general bad moral character of the plaintiff, during the period in which the account charged on the plaintiff's books accrued?
3. Did the evidence sustain the judgment?
4. Was the plaintiff the owner of the account sued on?

The rule under which books of account are competent evidence in this state, was clearly defined in *Vosburgh v. Thayer*, (12 *John*. 461,) and has been recognized so often since, that the law should be regarded as settled. It is, that the party must prove that during the period the charges were made he had no clerk; that some of the articles or work charged were delivered or performed; that the books are the account books of the party; and that he keeps correct accounts. This rule

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applies to all books of account, whether of the farmer, mechanic, professional man or merchant. (*Linnell v. Sutherland*, 11 *Wend.* 568.) The plaintiff's business was of that character which rendered books admissible to prove his account, and the evidence established the preliminary requisites to their admission.

At first books of account were admitted as evidence under the foregoing restrictions, on the presumption that there was no other evidence of the matter, from the necessity of the case; and it is insisted that books should not be admitted as evidence in any case, where proof of the accounts between the parties can be made by common law evidence. That as the law now is, parties being competent witnesses in their own behalf, the necessity for admitting books of account no longer exists, and hence they should be excluded.

I am not aware that in this state books of account have ever been rejected as admissible evidence, simply because the facts sought to be established by them could be proved by other species of evidence. The common practice has been the reverse. We were cited to an incidental remark of the court in *Sickles v. Mather*, (20 *Wend.* 75,) as sustaining the appellant's argument. It is this: "Several cases in states where the party's suppletory oath is allowed, exclude books as evidence of transactions where it appears they were in fact known to third persons. Such a precaution would be of very little utility in this state, where the party is not sworn," &c. This was said upon the question whether a person who called himself a foreman was also a clerk, and not upon any question, arising in the case, whether the books should be excluded because their contents could be proved by other evidence. The judge in that case expresses no opinion of his own, or what is the law of this state upon that question, but simply announces what several cases in other states have held, without naming them, and said those cases had no application in this state, as the law then stood.

So we were also cited to the case of *Conklin v. Stamler*, a

manuscript case, in the New York common pleas. It is there said, " But the important change recently made in the law of this state, by which a party may testify the same as any other witness, has obviated the difficulty that was supposed to exist, and there is now no occasion for resorting to books, unless it be to refresh the party's memory as to items, or in cases where there is a failure of recollection ; that the books, except in the cases above put, can no longer be received as sufficient evidence of the sale and delivery of goods, or of the performance of services, by merely proving the preliminary facts which heretofore made them sufficient evidence ; that the party, if he have no other means of establishing the facts, must go upon the stand as a witness, resorting to his books only where it is necessary to refresh his memory as to items ; or where, from a failure of recollection, he is compelled to rely upon them alone, he can swear to what is required to warrant their introduction as evidence to be submitted to the tribunal that is to pass upon the facts." This excludes books as evidence in every instance where the party can prove the facts by his own oath, and introduces the system of a suppletory oath to make the books admissible in other cases.

If this were entirely a new question now first presented for adjudication, the rule of the New York common pleas would meet my approbation. But the practice of admitting books of account as evidence under the rules adopted by the courts, has become too thoroughly engrafted upon our system of jurisprudence, to justify its being broken up and destroyed by judicial legislation. If done at all, it should be by legislative enactment. The suppletory oath was never adopted in this state, and there is nothing in the statute allowing parties as witnesses in their own behalf which contemplates the exclusion of books of account as evidence where the facts could be proved by the party, or as imposing the suppletory oath before the books would be admissible in cases where the facts could not be proved by the party.

Practically that statute may supersede the use of such books

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as evidence, because being regarded as of the weakest and most suspicious kind, no man will be willing to rest his case on such proof, when he can make a better one by his own oath. However that may be, the statute allowing parties to be witnesses has not abrogated the law admitting books of account as evidence under the rules as formerly settled, and to that extent I must dissent from the conclusions of the New York common pleas. In this case the books were properly admitted, and there was no error on that ground.

It is next insisted that the justice erred in not admitting the defendant to prove the general bad moral character of the plaintiff, for the purpose of discrediting his books. No such doctrine has ever yet obtained in this state, to my knowledge, and I trust never will. No cases directly in point were cited by the defendant's counsel, and the offer was unsound upon general principles. A man's general moral character may be bad, and yet the immorality be of such a character as not to affect the honesty and integrity of his dealings; he may be profane, intemperate or licentious. If the party's moral depravity was of a nature that would discredit his books, evidence of it was most certainly admissible. It was said in *Larue v. Rowland*, (7 Barb. 111,) that "any thing might be proved which would show that the books were unworthy of credit;" and in *Pennington's case*, that "the character of the man who keeps the books, the fairness, or unfairness, of the books from their appearance, the time and manner of making entries, &c. &c., were proper subjects for the due consideration of the jury." I most fully concur in these views. Reference is there had to the business character of the party, and not to his general moral character; to his integrity in deal, honesty in his charges, and the capacity, mode and manner of book-keeping. In this case the evidence of general moral character was properly excluded, and therefore there is no reason for reversal on that ground.

It is next objected that the evidence did not sustain the verdict. How that was this court is unable to determine. The

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CROPEY *v.* MCKINNEY.

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books were used in evidence, and in their absence the presumption is that they warranted the verdict. They are not contained in the return, and if they failed to prove the accounts, the appellant should have had them before the court.

It was urged that the accounts contained in the books had been assigned in writing by the plaintiff to his son, and that they had never been reassigned. If they had not, this action could not be maintained. (*Code*, § 111.) The son, however, testified to the assignment in writing to himself, and he still had the instrument and had never made any written transfer back to his father. He further testified that he and his father had since made different arrangements; that he had given back all the accounts and all claims upon the books, and that he had not now any claim upon them. If that were so, and it was a question of fact for the justice, such delivery and surrender operated as a parol assignment, and reinvested the plaintiff with title to the accounts.

The rulings of the court below were correct, and the judgment should be affirmed.

[FRANKLIN GENERAL TERM, September 13, 1859. *James, Roskrans and Potter*, Justices.]

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JAMES CROPEY *vs.* BRUCE MCKINNEY, MARY B. MCKINNEY,  
WILLIAM BANKS and WRIGHT POMROY.

STEPHEN A. GRIFFIN, JAMES CROPEY and HENRY C. GLINS-  
MANN *vs.* WILLIAM BANKS and WRIGHT POMROY.

THE SAME *vs.* THE SAME.

A mere creditor at large, without any judgment against his debtor, or lien upon his property or right to a preference in payment out of it, cannot maintain an action against such debtor and his assignees, to set aside an assignment of such property, executed by the debtor.

Where a husband absents himself from his wife for the space of five successive

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years, without being known to her to be living during that time, and she then marries another person, in good faith, supposing her former husband to be dead, her second marriage will be void only from the time its nullity shall be pronounced by a court of competent jurisdiction.

And it can be declared void only on the application of one of the parties to it, during the lifetime of the other. It cannot be declared void collaterally, after the death of the first husband, in actions instituted by creditors.

By marriage the husband becomes vested with a right to all of the wife's goods and chattels, and to her earnings, and the property acquired by her subsequently in carrying on a business in her own name.

Such a case is not affected by the acts of 1848 and 1849, giving additional rights to married women; where the question arises between the assignees of the husband and assignees of the wife.

A deed of separation, between husband and wife, if executed without any consideration, is void at law, even between the parties thereto. And it is void and of no effect, even in equity, as against the assignees of the husband, on a question arising as to the title to the property embraced therein.

The wife's covenant with her husband, in a deed of separation, being void, cannot form a consideration for the execution of the deed by him.

A deed of separation between husband and wife, by which the former relinquishes to the latter personal property and a business carried on by her in her own name, for her sole and separate use, and covenants that the property and business, and the profits of the business, shall thereafter belong to, and be carried on by her for her sole and separate use as if she were a feme sole, being executed without consideration, and without any covenant on the part of the trustee to indemnify the husband against the debts of the wife, is void even in equity, as to subsequent creditors.

The assent of the husband to his wife carrying on a business in her own name, carries with it an implied authority to contract debts, in conducting the business in her name.

And debts thus contracted, although contracted in the name of the wife, are the debts of the husband, and he is liable to be sued for them.

The husband, in such a case, has the right to make an assignment for the benefit of creditors, of the property in his wife's possession and of the business carried on by her; and such assignment will carry the title to such property, as against the assignees of the wife.

The assent of the husband that his wife shall carry on a business in her own name, does not carry with it an implied authority to her to make an assignment for the benefit of creditors.

**T**HESE actions were heard at special term, on pleadings and proofs. The facts are detailed in the opinion of the court, and need not be here repeated.

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CROPSEY v. MCKINNEY.

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*Wm. M. Evarts and Mr. Thompson, for the plaintiffs.*

*F. B. Cutting and Mr. Smales, for the defendants.*

SUTHERLAND, J. It is necessary to state a few of the general facts of these cases, to show how they originated, the questions in them, and how they came before the court, to be argued and disposed of together and as one suit.

Mary B. McKinney (then Mary Kinney) married one Gilbert McCullom in 1825. They lived together as husband and wife until 1835, when they separated. After their separation, and in 1836 or 1837, a deed or agreement of separation was executed by them, without any trustee. In May, 1837, she commenced the business of manufacturing bedding and upholstery in Hudson street, in the city of New York, which business she carried on from that time until July 22d, 1842, under the name of M. J. Kinney. McCullom and his wife continued to live separate until his death at the Bellevue Hospital in the city of New York, July 9th, 1851. On the 22d of July, 1842, she married one Bruce McKinney, without having obtained any divorce from McCullom. After this marriage she continued her business in Hudson and Canal streets, under the name of "Mary B. McKinney." Bruce, who was a seafaring man, lived with her and assisted her in her business till 26th September, 1844, when they separated, and on or about that day a deed of separation was executed between them and one George Langdon as her trustee. Upon the execution of this deed, Bruce McKinney left and went to sea, and continued absent until the following year, when he returned to the city of New York and opened a store in the Eighth avenue, where he carried on business in his own name for a few months. After this he returned to a seafaring life again, which he continued until the execution of the assignment by him hereafter mentioned, under which the plaintiffs in the last two suits claim. After the execution of the deed of separation, when in the city, on his return from time to time from

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his sea voyages, he and the said Mary lived and cohabited together as husband and wife, they having a child born in January, 1846. From the separation between them, in 1844, down to the time of the execution of the assignment to the defendants Banks and Pomroy, hereafter mentioned, the said Mary, with the knowledge and consent of Bruce McKinney, carried on the business aforesaid as a sole trader, in the name of "Mary B. McKinney," issuing business cards, buying and selling goods, giving and negotiating notes, drawing checks, taking out policies of insurance, taking and executing leases and signing receipts in that name, or in the name of Mrs. Mary B. or M. B. McKinney. On the 21st day of July, 1854, she made an assignment of all her stock in trade, property, book accounts, leasehold interests, &c. to the defendants Banks and Pomroy, for the benefit of her creditors, with preferences. On the execution of the assignment, Banks and Pomroy took possession of the assigned property.

The first of these actions was commenced by James Cropsey as a creditor, who had sold goods to Mary B. McKinney, while she was so carrying on business as a sole trader, after the execution of the assignment by her, but before the assignment by Bruce McKinney, as hereafter stated. The complaint in this action alleges that Bruce McKinney was indebted to the plaintiff in the sum of \$1694.52, for goods, wares, &c. sold and delivered to him; that he was a seafaring man and was then absent on a voyage to Liverpool; that he had been for many years engaged in the business of buying, selling and manufacturing cabinet and household furniture, mattresses, bedding &c., at 228 Hudson street and 707 Broadway, and had since 1844, and previous and up to the assignment by his wife Mary B. McKinney, conducted the same in the name of his wife; that the said Mary, with the proceeds of the business, took and made in her own name leases of stores and other buildings; that the indebtedness to the plaintiff was contracted by the said Mary in supplying the necessary goods for the said trade; that she had improperly assigned to Banks and

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Pomroy, and was fraudulently induced to make the assignment by Banks and Pomroy, setting forth the assignment; that Banks and Pomroy took possession and sold a part of the goods at retail and then closed the store, and were about sacrificing the balance, so that the plaintiff would lose his debt. The complaint prays for a judgment for the debt, and for an injunction and receiver. The answer of the defendants Banks and Pomroy to this complaint, denies that the plaintiff sold or delivered the goods to Bruce McKinney, but alleges that they were sold to Mary B. McKinney upon her sole credit, as part of her stock in trade, and that she carried on the business in her own name and on her own credit, and denies that Bruce McKinney was indebted to the plaintiff as claimed in the complaint. The answer also denies that the said Mary was the wife of Bruce McKinney, and alleges that if the marriage relation ever existed between them, it ceased to exist in 1844, and had been renounced since then, and that Bruce had no interest in the property; that in 1825 Mary married Gilbert McCullom, and that McCullom was living at the time of her marriage with Bruce McKinney, and that her marriage with Bruce was void. The answer insists upon the title of the defendants under the assignment of Mary B. McKinney, denying all fraudulent inducements, and insists that the plaintiff cannot maintain the action, because not a creditor by judgment or decree of the said Bruce or Mary.

After the assignment by Bruce McKinney to James Cropsey, Stephen A. Griffin and Henry C. Glinemann, the plaintiffs in the other two actions, as hereafter stated, the defendants Banks and Pomroy put in a supplemental answer to the complaint in this action by Cropsey alone, insisting upon such assignment to Cropsey and others, and the acceptance of it by them, and their claim of title under it being inconsistent with this action by Cropsey, and insisting that his complaint should be dismissed.

Some two or three weeks after the assignment by Mary B. McKinney to Banks and Pomroy, an assignment for the benefit

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Cropsey v. McKinney.

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of creditors was prepared in New York and sent to Bruce McKinney at Liverpool, and was executed by him there, on the 15th day of September, 1854, probably with the knowledge and approbation of Mary B. McKinney, who had become dissatisfied with the claim and conduct of Banks and Pomroy under her assignment.

Bruce McKinney, by his assignment, after reciting that Mary B. McKinney his wife had, by and with his consent, been engaged in the business in New York; and had taken leases of stores and houses for that and other purposes; and that pecuniary embarrassments had resulted from the business; and that he could not meet all the debts and liabilities as they became due and payable, assigns to James Cropsey, Stephen A. Griffin and Henry C. Glinsmann, all the goods and stock in trade then or late in the store No. 228 Hudson street or in No. 707 Broadway in the city of New York, whether purchased in his name or in the name of his wife, or whether then in her possession or not; and all the leases, terms for years and chattels real, whether taken and held in his or his wife's name; and all property, claims, demands, assets and effects, belonging to the said Bruce or in which he had any interest, to be disposed of by his said assignees, and the proceeds applied ratably towards the payment of all the debts and legal claims against, and liabilities of, the said Bruce, whether incurred by his said wife in or about the business aforesaid or otherwise; except the indebtedness of the said Bruce (in and about the business carried on by his wife or otherwise) to George Johnson or George Johnson & Co., to Phelps & Kingman, and to Mellen, Banks & Pomroy, of the city of New York; who are by the assignment constituted the second class of creditors.

Subsequently actions No. 2 and No. 3 were brought by the assignees of Bruce McKinney against Banks & Pomroy. No. 2 is a replevin suit, charging that the defendants became possessed of and wrongfully obtained the goods and chattels specified, which the defendants claim under the assignment of Mary B. McKinney, of the value of \$18,000. The answer

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denies the plaintiffs' title and ownership of the property, or that the defendants wrongfully became possessed of or detain the goods and chattels, but admits that as assignees of Mary B. McKinney the defendants took possession of goods, wares, &c., and before the commencement of the action sold and delivered a large amount thereof, and justify such taking, possession and sale, under the assignment of Mary B. McKinney.

The complaint in action No. 3, by the same plaintiffs against the same defendants, sets forth the assignment of Bruce McKinney to the plaintiffs; his marriage with Mary B. McKinney, July 21, 1842; his right to the property, trade and business conducted in the name of Mary B. McKinney at 228 Hudson street and 707 Broadway, and the leases thereof, and the improvements thereon, assigned by Mary B. McKinney to the defendants, (which assignment is alleged to be void,) and demands judgment for the possession of the premises and an assignment of the lease of 707 Broadway, and for an account of all the goods, leases and effects sold and disposed of by the defendants, and for the payment of the amounts and value to the plaintiffs. The answer reiterates substantially the matters contained in answers Nos. 1 and 2.

The three actions were by an order of the court referred to John S. Patterson, Esq. as sole referee, on the 11th of Dec. 1856, to take the testimony in them, which might be offered by either party, and report the same to the court, subject to all legal objections at the trial. By stipulation between the parties, it was agreed that the question of the value of the property taken by the defendants, and their receipts and payments, should be waived until the court should determine whether the defendants have the legal title thereto. I deem this to be a sufficient statement of the facts, to show the questions now to be disposed of in these cases.

As to the first action, by Cropsey against Banks and Pomroy, Bruce and Mary B. McKinney, it is clear that being a mere creditor at large, without any judgment against either Bruce or Mary B. McKinney, he is not entitled to any of the equita-

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ble relief asked for by him in that action. (*Reubens v. Joel*, 3 *Kernan*, 488.)

Being a mere creditor at large, he had no lien on the assigned property, and no right to a preference of payment out of it, though the debt and assigned property were the debt and property of Bruce McKinney, and the assignment of Mary B. McKinney to Banks and Pomroy was unauthorized and void.

I do not think that the undertaking given by Banks and Pomroy, on the dissolution of the injunction in the action, to apply so much of the proceeds of the assigned property and effects as should be sufficient to satisfy the plaintiff's claim with costs, if established in that action, against the said property and effects, affects the question; and I think that Cropsey's acceptance of the assignment from Bruce McKinney is inconsistent with any claim to a preference over other creditors in or through this action. But I do not see why Cropsey is not entitled in the action to a judgment against Bruce McKinney for his debt.

As to the other two actions, the only question before me now is the question of title, as between the assignees of Bruce and the assignees of Mary B. McKinney. I think the decision of this question depends entirely upon whether the marriage between Bruce and Mary was absolutely void or voidable only, McCullom, her first husband, being alive when the marriage ceremony took place between her and McKinney. And whether her marriage with McKinney was void, or voidable only, I think depends upon the questions of fact, as to which the great mass of the testimony in these cases was taken, whether Gilbert McCullom absented himself for five years, prior to July 22d, 1842; and whether Mary his wife married McKinney on the 22d July, 1842, not knowing McCullom to be living during the five years prior to such marriage, (but supposing him to be dead.)

If McCullom had absented himself "for the space of five successive years" prior to her marriage with McKinney, without being known to her to be living during that time; and

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she married McKinney in good faith, supposing McCullom to be dead, then by the statute (2 R. S. 139, § 6) her marriage with McKinney will be void "only from the time its nullity shall be pronounced by a court of competent jurisdiction;" otherwise it was at common law and by statute absolutely void. (2 R. S. 139, § 5.)

If her marriage with McKinney was and is voidable only, then I think the title of the assignees of Bruce McKinney to the property and proceeds of the property in question is good as against the assignees of Mary B. McKinney.

As McCullom is dead, this marriage, if voidable only, and it and its issue are within the protection of the statute, can be declared void only on the application of one of the parties to it, during the lifetime of the other. (2 R. S. 142, § 22.) It cannot be declared void collaterally, in these actions or either of them.

If her marriage with Bruce McKinney was contracted by her in good faith and under circumstances, which by the statute makes it voidable only, then as between the assignees of Bruce McKinney and the assignees of Mary B. McKinney, and as to the question of title between them in these actions, that marriage was and is valid, and she and Bruce McKinney were and are husband and wife. If the marriage is voidable only as between Bruce and Mary B. McKinney, it follows, I think, that as between these parties, as respects the title to the assigned property in these actions, the question is precisely the same as if McCullom had been dead, when the marriage with Bruce McKinney was contracted.

Without reference to the deed of separation between Bruce and Mary B. McKinney and Langdon as her trustee, in 1844, Bruce McKinney by the marriage was vested with a right to all of her goods and chattels and to her earnings, and the property acquired by her in the business since. (2 Kent, 143. 3 T. R. 631. *Lovett v. Robinson*, 7 How. Pr. R. 105. *Gates v. Brower*, 5 Selden, 205.)

I do not think that the acts of 1848 and 1849, giving addition-

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al rights to married women, affect the question. Nor do I think that the deed of separation between Bruce and Mary B. McKinney, although executed by Langdon as her trustee, affects the question of title, as between the assignees of the husband and the assignees of the wife.

The deed of separation by which Bruce McKinney purported to relinquish all the property to Mary B. McKinney for her sole and separate use, and covenanted that the property and the business, and the profits of the business, should thereafter be carried on and belong to her for her sole and separate use, as if she were a feme sole, was executed by him without any consideration. The \$2000 received by him as the consideration for its execution by him, was his own money before and when he received it. The deed of separation itself states that the \$2000 was paid him out of the stock of goods and the profits of the business so relinquished by him to his wife. There was in the deed no covenant on the part of Langdon, the trustee, to indemnify Bruce McKinney against the debts of his wife. At law, she as a married woman was unable to contract with her husband or any other person, or to sue or be sued as a feme sole. Her covenant with her husband in the deed of separation being void, could form no consideration for its execution by him. The deed of separation being without consideration was at law void, even between the parties. It could not and did not, being void, legally vest the property in Langdon the trustee, and did not and could not divest Bruce McKinney of the property as husband, or of the right as husband to the future earnings of his wife and the profits of the business.

The following authorities are sufficient, I think, to sustain the proposition that the deed of separation was voluntary and without consideration: *Beach v. Beach*, 2 *Hill*, 260; *Marshall v. Hutton*, 8 *T. R.* 547; *Legard v. Johnson*, 3 *Ves.* 352.

The deed of separation being voluntary and without consideration, and void at law, it is doubtful whether a court of equity would have enforced it, even between the husband and

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wife, by protecting the person of the wife or the property and business, from the interference of the husband. (*Rogers v. Rogers*, 4 Paige, 516.) But conceding that as between the husband and wife, in consideration of the intemperance of the husband and under the circumstances of the case, a court of equity might so far have enforced the deed of separation; yet I am of the opinion that the deed must be considered void and of no effect even in equity, as against the assignees of the husband, on the question of title to the property in dispute.

The deed of separation being without consideration and without any covenant on the part of the trustee to indemnify the husband against the debts of the wife, if good in equity between the husband and wife, was, I think, void even in equity as to the subsequent creditors. The assignees of the husband are creditors themselves, and as assignees are trustees for all the creditors.

Notwithstanding the deed of separation, the property and business remained the property and business of the husband, as to the creditors. The evidence shows that the business was carried on in the name of Mary B. McKinney with the assent of Bruce McKinney. The assent to her carrying on the business in her name, carried with it an implied authority to contract debts in conducting the business in her name.

The debts contracted in the business, although contracted in the name of Mary B. McKinney, were the debts of Bruce McKinney and not the debts of Mary, and he and not she was liable to be sued for them. (*Lovett v. Robinson*, 7 How. Pr. Rep. 105, and *Gates v. Brower*, *supra*. *Riley v. Suydam*, 4 Barb. 222. 2 *Bright's Husband and Wife*, 300, 301, §§ 20, 21.)

From his liability for the debts, and from the fact that as to the creditors at least he had the legal title and right to the property, and not Langdon the trustee, I think it follows that Bruce McKinney had the right to make an assignment for the benefit of the creditors, and that his assignment is valid and carried the title to the property, as against the assignees of

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the wife, notwithstanding the deed of separation. But if the deed of separation ever had any validity as between Bruce and Mary McKinney, it would appear to have been subsequently abandoned or rescinded, by their cohabitation and conduct. (*Carson v. Murray*, 3 Paige, 483.)

My conclusion is, that if in fact the marriage with Bruce McKinney was contracted in good faith, she supposing McCullom to be dead and under circumstances which make it voidable only, under the statute, the assignees of Bruce McKinney have a good title to the property and the proceeds of the property in question, as against the assignees of Mary B. McKinney. The property or proceeds of the property, under his assignment, will go where it ought to go, to pay the debts contracted in the business.

The assignment of Mary B. McKinney was void as her act. She was disabled by her coverture from making an assignment or any other contract which would be valid as her act. Her assignment can only be upheld upon the ground that it was executed under an implied authority from Bruce, and that it is his assignment.

But it is absurd to say that the assent of the husband, that the wife should carry on the business in her name, carried with it an implied authority that she might make an assignment for the benefit of creditors; the property, debts and legal liabilities being his, not hers.

To return then to the question whether the marriage with McKinney was contracted in good faith, and under circumstances which give the parties and their children the benefit of the statute, the decision of which question of fact I have endeavored to show, must determine the question of title to the property as between the assignees of Bruce and the assignees of Mary B. McKinney. Upon this question of fact a vast deal of testimony was taken. After a careful examination of the evidence and due consideration of the arguments of counsel, I have come to the conclusion that the marriage with Bruce McKinney was contracted by Mary in good faith, she

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believing McCullom to be dead, and after an absence of McCullom for five successive years and without her having known during that time that McCullom was living.

Bruce and Mary B. McKinney were both sworn as witnesses before the referee, and both were objected to as not competent. I suppose neither of them was a competent witness in the first action, to which they are both parties; but their testimony was of no importance in that action. I do not see why they were not both competent witnesses in the other two actions, to which they are not parties. Certainly any resulting interests under the assignments would not render them incompetent.

Mary B. McKinney swears that she separated from McCullom in September, 1835; that the last time she ever saw him was in May, 1837; that when she married McKinney, July 22, 1842, she had not heard and did not know of McCullom's being alive since she saw him in May, 1837; that she supposed him to be dead; that he was intemperate and had fallen off of the docks previous to May, 1837; that in June, 1837, she read an account in the newspapers of a body that had been taken out of the water, that had been in the water for some time; and that from the description she supposed it to be the body of McCullom, and went to see it in Montgomery street, but when she got there found it had been buried the day before; that from the description which she received of the clothes on the body, they corresponded with the clothes McCullom wore when she last saw him; that she supposed the body was the body of McCullom. Several witnesses corroborate this testimony of Mary B. McKinney. There is a good deal of testimony on the other side, to show that McCullom was seen in New York from time to time between May, 1837, and July 22, 1842; but it is not satisfactorily proved, I think, that Mary B. McKinney saw him or knew or was informed that he was alive between those dates. If Mary B. McKinney knew or supposed that McCullom was alive when she married McKinney, she not only committed a great crime when she mar-

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ried McKinney, but has added to that crime another great one in these suits. A presumption that she has committed these crimes should not be indulged in on slight grounds.

My conclusion on the whole case is, that as between the assignees of Bruce and the assignees of Mary B. McKinney, his assignees are entitled to the property and proceeds of the property taken by Banks and Pomroy under her alleged assignment; and there must be a reference to Mr. Patterson, the same referee who took the testimony in these cases, to ascertain the value of such property and to take an account of their receipts and payments on account of the same, under the stipulation of the parties.

As it appears that McCullom was in fact alive when the marriage with McKinney was contracted, and did not die until June, 1851, and as it appears that he had a child by Mary B. McKinney which is supposed to be now living, and as a question might be raised whether, notwithstanding the second marriage and the deed of separation between McCullom and Mary B. McKinney, his personal representatives or child may not have some right or interest in or to the property, or the proceeds of the property in question, the assignees of Bruce McKinney must take the property and its proceeds subject to such claim or interest, if any there be.

Neither the representatives of McCullom nor his child are parties to these actions, and I have not examined any such question.

[NEW YORK SPECIAL TERM, October 21, 1859. *Sutherland, Justice.*]

**MERRITT vs. CARPENTER & REYNOLDS.**

In an action brought to recover the possession of real property, and damages for the unlawful withholding of the same, the defendant may be arrested and held to bail. Consequently, if the plaintiff fails in the action, and there is a judgment against him for the costs, he becomes himself the judgment debtor, and, by virtue of § 288 of the code, is liable to arrest and imprisonment upon an execution issued in satisfaction of the judgment.

**M**OTION, by the defendants, for a new trial, on exceptions taken at the circuit.

*J. W. Tompkins*, for the defendants. I. The complaint in the suit, in which the execution was issued, alleges that the defendant, on 31st August, 1851, entered into and upon said premises and every part thereof, and ever since continued, and now is, in possession thereof, in violation of the rights of the plaintiff, and unlawfully withheld possession of the lands from the plaintiff, and still withholds such possession, and demands judgment that the defendant be adjudged to surrender possession of the lands to the plaintiff, and also to pay the plaintiff \$500 damages for said unlawful withholding of the same. These two causes of action were allowed to be united, by sub. 5 of § 167 of code, "Claims to recover real property, *with or without* damages for the withholding thereof, and the rents and profits of the same." These causes of action are in tort, for either of which, before the code, the plaintiff could have been imprisoned for the defendants' costs, on a judgment in his favor, and the code has not altered the law. Section 179 of the code provides that the defendant may be arrested in five cases. The first case is the one under which this execution issued. "In an action for the recovery of damages &c. for *injuring or for wrongfully taking, detaining or converting property.*" Then § 464 of the code provides, "The word *property*, as used in this act, *includes property real and personal.*" Thus making the above quotation of sub. 1 of the 179th section of the code to read, "in an action for the recov-

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ery of damages for injuring or for wrongfully taking or detaining or converting *real property*." The words in the complaint in the suit in which execution issued, may not be the precise words of that subdivision, but they are equivalent and tantamount thereto, mean the same, and express the same cause of action for which the arrest therein provided is allowed. By § 288 of the code, where the defendant could be arrested under § 179, an execution against the person of the judgment debtor may be issued. (*Kloppenbergh v. Neefus*, 4 *Sandf.* 655. *Corwin v. Freeland*, 6 *How. Pr. Rep.* 245.) The rights of the parties to imprison on execution are reciprocal. Therefore the execution was properly issued, and the judge's refusal to nonsuit and charge were erroneous. If a plaintiff unites tort and contract in the same action, and fails, the defendant can imprison the plaintiff for the costs. (*Miller v. Scherder*, 2 *Comst.* 268.)

II. In any event, the defendant Reynolds, as deputy sheriff, was protected by the execution in question, which was regular on its face, without showing any judgment; and the decision of the judge, that said judgment and executions did not authorize the *defendants*, or *either* of them, to arrest Sylvanus Merritt, was clearly erroneous, and the judgment appealed from should be reversed. (*McQuinty v. Herrick*, 5 *Wend.* 240. *Lewis v. Palmer*, 6 *id.* 367, 369. *Savacool v. Boughton*, 5 *id.* 170. *Hutchinson v. Brand*, 5 *Seld.* 208.) Facts to authorize an arrest need not be stated in the execution. It justifies the sheriff without it.

III. The charge of the judge, on the above two points, to the jury, was therefore erroneous; and that part of his charge, in which he says "That the jury, in determining the damages to be awarded to the plaintiff, might take into account the payment by him to the defendants of the amount of that judgment and execution," was also erroneous. The judgment was paid by Merritt by the arrest and satisfaction. It was a just debt; he was bound to pay; and all the damages he could recover was for the loss of time and detention, about 1½ hours, under the execution.

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IV. The damages (\$500) found by the jury were not warranted by the evidence. They were grossly vindictive and excessive, and evince in the jury gross ignorance or partiality. The defendants acted honestly and without malice, and vindictive damages are not in such cases to be allowed.

*S. E. Lyon*, for the plaintiff. I. There was no error in the refusal of the justice, upon the trial, to nonsuit the plaintiff. The judgment and executions in the ejectment suit were no justification to the defendants for arresting the plaintiff. (1.) An execution against the person of a plaintiff, for costs, cannot issue in an action to recover *the possession of real property, and for mesne profits*. Section 28 of the code provides: "If the action be one in which the defendant might have been arrested, as provided in sections 179 and 181, an execution against the person of the judgment debtor may be issued to any county within the jurisdiction of the court, after the return of an execution against his property unsatisfied in whole or in part." The first subdivision of section 179 (under which the right to arrest is claimed in this action) is as follows: "1. In an action *for the recovery of damages, on a cause of action not arising out of contract*, when the defendant is not a resident of the state, or is about to remove therefrom, or when the action is for an injury to person or character, or for injuring, *or for wrongfully taking, detaining or converting property*." This last clause has reference solely to the old action of trover, for taking, detaining or converting personal property. It does not even include actions to recover *the possession of personal property*, as is manifest from subdivisions three and four of the same section, which require, in such actions, proof of *fraud*, in the concealment or disposition of the property, before arrest may be made. An action to recover possession of real property is not an action for *wrongfully taking or converting property*, and the incidental demand of the rents and profits is based not upon the *retention of the property*, but the withholding the *possession*. Real property

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is not susceptible of physical taking, conversion or detention. That the legislature did not design that an execution against the person should issue in such a case, is further manifest from the 289th section of the code, which prescribes the form of the various kinds of execution, and provides for a distinct and peculiar execution for the delivery of the possession of property and for rents and profits. In *Fullerton v. Fitzgerald*, (18 Barb. 441 ; 10 How. Prac. Rep. 37,) it was held that "in an action to recover the possession of real estate, and also the rents and profits thereof, the unsuccessful party cannot be imprisoned." In that case, Justice Dean uses the following language, (p. 443 :) "An action of ejectment is not 'an action for the recovery of damages' for any purpose. But if it were, no lawyer will say that the legislature intended to include it in an action for injuring, detaining or converting property." (2.) The question is not presented upon this appeal, how far the person executing the process (the defendant Reynolds) was protected by it. No separate motion on his behalf, for his discharge or otherwise, was made at the trial. But if any such motion had been made, it must have been denied. The execution was absolutely void and unauthorized by law, and could furnish no protection to the officer. Even if regular upon its face, he is chargeable with notice of its real character and of the nature of the action in which it issued. (3.) If the process was regular on its face, and the officer would be otherwise protected, he is liable in this action, if the jury believed, from the evidence, that he had executed the process in an oppressive or wanton manner, or had used it for the purpose of extorting from the fears of the plaintiff the payment of money ; and the plaintiff, upon the testimony in the case, would have been entitled to go to the jury upon that question, if the officer had asked to be discharged. (*Savacool v. Boughton*, 5 Wend. 170, 181. *Griswold v. Sedgwick*, 6 Cowen, 456. *Holley v. Mix*, 3 Wend. 350.)

II. The justice properly charged the jury, "that in determining the damages to be awarded by them to the plaintiff,

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they might take into account the payment by him to the defendants of the sum of \$74.39, and that that payment was compelled by process illegally and wrongfully issued." The jury would have greatly erred if they omitted "*to take into account*" facts so prominent and significant, and which go so far to characterize the offense complained of. The greatest injury and annoyance to the plaintiff, upon the night of his sudden and wrongful arrest, arose from the persistent exaction of the immediate payment of the said sum of money, and he is entitled to relief, if at all, by the very fact that the process under which the defendant compelled such payment was "illegally and wrongfully issued."

The justice, in charging the jury, might, with propriety, have gone much further, and instructed them "that in awarding damages to the plaintiff, they might include the said sum of \$74.39 thus illegally compelled to be paid." *The actual pecuniary loss* sustained by the plaintiff, in consequence of the wrongful act of the defendant, is, in all actions of tort, a primary element of damages. In certain actions of simple trespass, without malice, vexation or aggravation, the plaintiff is confined to such primary loss; but in actions of assault and battery and the like, damages *beyond* the mere actual loss in money are allowable in the discretion of the jury. It has never been questioned, however, that such loss of money, when a direct consequence of the wrong complained of, is a proper or necessary part of the damages, whether the jury choose to give any thing in addition or not. This item of damage is specially laid in the complaint in this action. (3 *Graham & Waterman on New Trials*, 1116, 1120, 1126, 1127. *Ford v. Monroe*, 20 *Wend.* 210. *Wort v. Jenkins*, 14 *John.* 352.)

*By the Court*, BROWN, J. This is an action for trespass and false imprisonment, tried at the Westchester circuit, where the jury rendered a verdict for \$500 damages, in favor of the plaintiff. The defendant set up as a defense, in justification, an execution against the body of Sylvanus Merritt, the plain-

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tiff in this action, issued out of this court to the sheriff of the county of Westchester, upon a judgment for costs, rendered in another action, wherein Sylvanus Merritt was also the plaintiff and the defendant Isaac Carpenter was also defendant, brought to recover the possession of real property, and damages for the unlawful withholding the same. It appeared upon the trial that Reynolds, the other defendant, was duly authorized by the sheriff of the county of Westchester to execute the writ or process, by an indorsement thereon which created him a special deputy for that purpose. I propose to consider only whether Merritt, the plaintiff, was subject to arrest and imprisonment in satisfaction of the judgment recovered against him.

Until the passage of the act of the 26th April, 1831, "to abolish imprisonment for debt and to punish fraudulent debtors," a *capias ad faciendum*, upon which the judgment debtor might be arrested and imprisoned, was one of the usual and customary remedies to enforce the judgments of the courts, whether arising *ex contractu* or *ex delicto*. That act declared that "no person should be arrested or imprisoned on any civil process issuing out of any court of law, or on any execution issuing out of any court of equity, in any suit or proceeding instituted for the recovery of any money due upon any judgment or decree founded upon contract, or due upon any contract express or implied, or for the recovery of any damages for the non-performance of any contract." There were some contracts and some persons excepted from the provisions of the act, but the general rule was to abolish imprisonment in actions arising upon contract or upon judgments founded upon contract, and retain the remedy as to actions arising or judgments founded upon tort. So the law remained until the adoption of the code of procedure, in which the distinction to which I refer is still retained, with some modifications. Section 179 provides, amongst other cases, that the defendant may be arrested "in an action for the recovery of damages on a cause of action not arising out of contract, where the defendant is not a resident of the state or is about to remove therefrom

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—or where the action is for an injury to person or character—  
or for injuring or for wrongfully taking, detaining or converting  
property.” The words “wrongfully taking, detaining or con-  
verting property” must be construed to apply to personal  
property exclusively, because the terms are not applicable to  
real property, which cannot from its nature be taken, detained  
or converted. But the words “for injuring property” must  
have a more general and universal signification; applying to  
real property and also to personal property when the latter  
is injured and its value is impaired or destroyed, but is not  
taken, detained or converted. This view is confirmed by  
reference to section 464, which declares that “the word prop-  
erty, as used in this act, includes property real and personal.”  
The code vainly essays to take away and abolish the distinction  
between actions at law and suits in equity, and the forms of  
actions and suits as they existed when it took effect. But  
legal and equitable remedies, and the various forms of action,  
are real and substantial things, and will not be abolished.  
They still continue to exist, claiming daily, constantly and  
perpetually, the notice and recognition of the judicial mind,  
and without such notice and recognition, justice and truth—  
the life and spirit of the judicial administration—would die  
out and disappear. Remedies for the redress of particular in-  
juries may be designated by new names, but they are still  
substantially the same. Thus the remedy known to the code  
as an action to recover real property or the possession thereof,  
is the old action of ejectment, under another name; and  
whether we call it by one name or the other, the thing itself  
remains what it always was. So too the claim to recover dam-  
ages for withholding real property mentioned in subdivision 5  
of section 167, is the action or suggestion to recover the mesne  
profits, known to the old law. The section (179) of the code  
to which I have referred provides then, that for injuries to real  
property a defendant may be arrested, and section 288 also  
declares that “if the action be one in which the defendant  
might have been arrested as provided in sections 179 and 181,

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an execution against the person of the judgment debtor may be issued to any county within the jurisdiction of the court, after the return of an execution against his property unsatisfied in whole or in part." The action of trespass *quare clausum fregit* is plainly one in which the defendant may be arrested and held to bail, and in the event of a judgment against him, may also be taken in execution and imprisoned in satisfaction of the judgment. And for no other reason than because an unlawful entry upon the lands of another is an injury to real property, within the meaning of section 179. Now if it shall appear that the common law action of ejectment and the action to recover the mesne profits were substantially actions of trespass for unlawful entries upon real property, then I think it will be decisive of the principal question in controversy in this action.

The common law action of ejectment was in every sense an action of trespass, because it implied a wrongful entry and an eviction or ouster of the true owner. Mr. Blackstone (*Com. vol. 3, p. 199*) describes the action thus: "A writ of *ejectione firmæ*, or action of trespass and ejectment, lieth where the lands or tenements are let for a term of years, and afterwards the reversioner, remainderman or any stranger doth eject or oust the lessee of his term. In this case he shall have his writ of ejection to call the defendant to answer for entering on the lands so demised to the plaintiff for a term that is not yet expired and ejecting him. And by this writ the plaintiff shall recover back his term or the remainder of it with damages." And he adds, that upon the disuse of real actions, this mixed proceeding became the common method of trying the title to lands and tenements. This was effected, whatever the nature of the estate claimed might be, by means of fictitious parties and a consent rule in which the real defendant agreed to confess upon the trial, lease, entry and ouster, which left the title of the plaintiff the only subject in controversy. Mr. *Runnington*, in his treatise on the action of *ejectment*, (page 23,) says: "By the modern practice the defendant is obliged by rule of

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court to confess lease, entry and ouster; yet that rule was only designed to expedite the trial of the plaintiff's right, and not to give him a right which he had not before. Hence it must appear that the plaintiff had actually the possession and was ousted thereof by the defendant; for the action of ejectment is an action of trespass in its nature, and is said to have been committed *vi et armis*." The revised statutes, which took effect in 1850, made some changes in the mode of proceeding. They substituted the names of the real for the fictitious parties, and abolished the consent rule. And they also provided that instead of the action for mesne profits theretofore used, the plaintiff should, within one year, make and file a suggestion of such claim, upon which his right was to be determined. But they still required that an ouster, or its equivalent, should be proved upon the trial. Trespass is the proper remedy to recover damages for an illegal entry upon or injury to real property. (1 *Chitty's Plead.* 173.) Such an entry is deemed to be committed with force, actual or implied. The action to recover the mesne profits or damages for withholding the possession, was also an action for trespass. In order to complete the remedy when the possession has long been detained from him that had the right to it, an action of trespass also lies, after a recovery in ejectment, to recover the mesne profits which the tenant in possession has also received. In this case the judgment in ejectment is conclusive evidence against the defendant for all the profits which have accrued since the date of the demise stated in the former declaration of the plaintiff. (3 *Black. Com.* 206.) "The action for mesne profits certainly results from, or is rather consequent to, the recovery in ejectment. It is an action of trespass *vi et armis*, brought by the lessor of the plaintiff in his own name, or in the name of the nominal lessee, against the tenant in possession, to recover the value of the profits unjustly received by the latter in consequence of the ouster complained of in the ejectment." (*Runnington on Eject.* 438.) Before entry and actual possession, a person cannot maintain trespass, though

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he hath the freehold in law. A disseisee may have trespass against the disseisor for the disseisin itself, because he was then in the actual possession; but not for an injury after the disseisin, until he hath gained the possession by re-entry. And then he may support the action for the intermediate damage; for after the entry, the law, by a kind of *jus postlimini*, supposes the freehold to have all along continued in him. And after recovery in ejectment, the action may be supported for mesne profits, though anterior to the time of the demise in the declaration in ejectment, unless when a fine has been levied, in which case trespass cannot be supported for an injury committed anterior to the entry to avoid the fine. (1 *Chitty's Plead.* 177, and the cases referred to in the notes.) I refer to these authorities to show that an action to recover real property, or the possession of real property, with damages for withholding the possession, is in fact an action of trespass, because it assumes and proceeds upon the idea that the entry and the withholding is wrongful and unlawful, and an action of trespass is an action for an injury to real property. The code disdains to employ the terms trespass *quare clausum fregit*, trespass and ejectment or mesne profits, but substitutes in their place the words "claims to recover real property, with the damages for withholding thereof, and injuries to property."

Upon the trial of this action the defendants produced and read in evidence the record of the judgment in this court, upon which the execution against the body of the plaintiff was issued, and under which the defendants claimed to justify the arrest. The complaint, which discloses the real nature of the action, after stating that the plaintiff was lawfully seised of as owner in fee simple, and entitled to the possession of certain lands in the town of Rye, county of Westchester, proceeds to say, "that the defendant, on or about the 31st day of August, 1851, entered into and upon the said premises, and every part thereof, and ever since has continued, and now is, in possession thereof, and every part and portion thereof, in violation of the rights of this plaintiff, and unlawfully with-

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holds the possession" &c. ; and concludes by demanding judgment, that the defendant "surrender the possession of the premises, described as aforesaid, to the plaintiff, and pay to the plaintiff damages for the said unlawful withholding of the same, to the sum of \$500, besides the costs of the action." The answer denied the title of the plaintiff and set up title in the defendant. It also denied that the plaintiff was entitled to the possession, or that the defendant entered into the possession in violation of the plaintiff's rights, or that he unlawfully withheld the possession from the plaintiff. This was the issue which the record showed had been tried, and judgment rendered in favor of the defendant. To enter into and upon lands and real property of which another person is the true owner in fee simple, and entitled to the possession, in violation of the rights of such owner, and to withhold from him, unlawfully, the possession of such lands and real property, would have been an injury which, under the old law, must have been redressed by the action of trespass *quare clausum fregit*, or of trespass and ejectment, with an action or a suggestion for the mesne profits, in the event of a recovery in the latter action. It could have been redressed and the owner could have been compensated for the injury, or restored to his rights in no other way. It would then have been regarded, and still must be deemed, an injury to property—an injury to real property. If injuries of this character are not included within the terms "injury to property," for which the defendant may be arrested and finally imprisoned, in satisfaction of the judgment, according to the sections 179 and 288 of the code, we have no means of determining what other meaning shall be attached to the expression ; for a wrongful entry upon lands, and an unlawful withholding the possession of lands from the true owner, in violation of his legal rights, are amongst the most ordinary and usual injuries done to real property.

I am, for these reasons, well persuaded that in the action brought by the present plaintiff Sylvanus Merritt, against the

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defendant Isaac Carpenter, to recover possession of the lands in Rye, Westchester county, the record of which was produced upon the trial of this action, the defendant Carpenter could have been arrested and held to bail. Consequently when the plaintiff in that action failed, and there was a judgment against him for the costs, he became himself the judgment debtor; and, by virtue of section 288, became liable to arrest and imprisonment, upon an execution issued in satisfaction of the judgment. The learned justice who tried this action thought otherwise, however, and directed the jury to find a verdict for the plaintiff, because he was wrongfully arrested upon the execution. To this part of the charge the defendant's counsel excepted, and I think the exception well taken.

There should be a new trial, with costs to abide the event.

[ORANGE GENERAL TERM, September 12, 1859. *Lott, Emott and Brown, Justices.*]

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THE BOARD OF SUPERVISORS OF THE COUNTY OF LIVINGSTON *vs.* JOHN WHITE, Jun. and others.

It is not necessary, in a complaint, to allege the loss of a bond, to entitle the plaintiff to prove its loss and give secondary evidence of its contents.

The doctrine of profert has no place in the present system of pleading; ample provision otherwise existing for the production and inspection of papers. And, independent of profert, there never was any necessity or reason for saying any thing about the loss of the bond sued on, in stating the cause of action. *Per* T. R. STRONG, J.

What is sufficient evidence of the loss of a bond, to authorize the admission of secondary evidence of its contents.

Where an instrument is presented to the board of supervisors, by a county treasurer, as his official bond, the fact that it was sealed may, in the absence of any direct evidence on that subject, be inferred from the instrument being presented as a bond, which implies a sealed obligation.

A judgment in favor of the people, against a county treasurer, in an action for the recovery of money received by him in his official capacity, and the imprisonment of the defendant upon an execution issued on that judgment, do

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not constitute any defense to a subsequent action against such county treasurer and his sureties, brought by the board of supervisors, for the recovery of the same money.

The provisions of the revised statutes on that subject contemplate a double direct liability by the county treasurer; one by him individually to the state, so far as the state tax is concerned, and the other by him, in connection with his sureties, to the county, on his bond, embracing the entire duties of the treasurer; upon each of which liabilities an action may be maintained.

The imprisonment of a treasurer, at the suit of the state, does not affect in any way the action at the suit of the county. Such an imprisonment is not a satisfaction of the liability which is the subject of that action.

**A** PPEAL from a judgment entered at a special term, after a trial at the circuit. The action was commenced in August, 1856. The cause was tried at the Livingston circuit, before Justice JOHNSON and a jury, in October, 1857. The complaint alleged, that at a general election held in the county of Livingston, in the year 1854, the defendant, John White, jun., was duly elected county treasurer of said county of Livingston, for a term commencing on the first day of January then next, and continuing three years; that the said John White, jun. accepted said office, and executed an official bond with sureties; that the bond was approved by the board of supervisors, and filed in the office of the county clerk before he entered upon the discharge of the duties of his office; that John White, Henry F. Hill, John L. Harrison and William M. Bond, the other defendants, were the sureties on said bond; that the bond was in the usual form of a treasurer's bond. That in the year 1855, the said John White, jun., as such county treasurer, received the state tax of that year, amounting to \$13,000, and also in the year 1856 the tax, amounting to \$23,932. That on the first day of May, 1856, there was in his hands the sum of \$28,444.92 of said tax, which he had neglected and refused to pay over according to law; that a demand of payment had been made by the state treasurer, and that the comptroller had directed the plaintiff to institute a suit on the bond; and the plaintiff demanded judgment for

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the amount so in the hands of the said treasurer. The said John White, jun., treasurer, and the other defendants, his sureties, answered separately, putting in issue the matters set forth in the complaint. The defendant John White, jun., in addition to a denial of the execution and delivery of the bond sued on, set up as a defense, that on the 20th day of August, 1856, the people, by their attorney general, commenced an action against him, to recover the same money, which it was alleged he had neglected to pay to the state treasurer as required by law, being the same cause of action for which this action was commenced; that judgment was duly obtained in said action; that an execution had been issued on said judgment, against the body of said John White, jun., on which he had been arrested, and confined in jail; that he was so confined at the time of the answer; and he claimed that such arrest and imprisonment was a satisfaction of said judgment, and a bar to any further proceedings by the plaintiffs in this action. On the trial it appeared, that at the November election, 1854, John White, jun. was elected treasurer of the county of Livingston, for the term of three years from the 1st day of January, 1855. That after his election, the said White presented to the board of supervisors of the county an official bond, purporting to be signed by himself, John White, and Henry F. Hill. It seems that the board of supervisors did not regard the sureties as sufficient, and the bond was returned to White for additional sureties. Subsequently a bond was again before the board, with the additional names of John L. Harrison and William M. Bond. The last time that this bond was seen, so far as the testimony shows, it was before the board of supervisors. It does not appear that it was ever taken away from there. On the first day of January, White entered upon the discharge of the duties of his office. In July, 1856, it was ascertained that he had not paid over the state tax of 1855 and 1856; that on the first day of May, 1856, there was due to the state the sum of \$28,444.92. This state of things called attention to the treasurer's official

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bond. On examination at the county clerk's office, where it should have been filed, it could not be found. From the minutes kept by the board of supervisors for the year 1855, it appears that in November of that year the board settled with the treasurer, through a committee appointed for that purpose; that such committee reported to the board a statement of the account of the receipt and expenditure of money by the treasurer for that year, in which statement is an item as follows: "To paid state tax, \$13,797.57." The committee also reported that they had compared the vouchers for all moneys paid out, and found them to agree in every particular with the treasurer's books, and with the said statement; which report was adopted. At the time of the trial of this action a judgment had been obtained in favor of the people against John White, jun., for the state tax received by him in the years 1855 and 1856, being the same money for the recovery of which this action was brought; and the defendant, John White, jun., was then imprisoned upon an execution duly issued on said judgment. At the close of the plaintiff's testimony, the defendants moved for a nonsuit, on these grounds: 1st. That there was no evidence in the case to show that the bond was lost, as it was not proved that it was filed in the clerk's office; consequently there was not sufficient legal proof of its execution. 2d. There was no proof that the defendant signed and sealed the bond, assuming it to be lost; at least there was no proof that the defendants Harrison and Bond signed and sealed the bond; and as to them, one or both, the plaintiffs should be nonsuited. 3d. There was no proof that the bond was approved by the supervisors. 4th. There was no proof of the delivery of the bond. 5th. The plaintiffs had not made out a cause of action.

The court denied the motion, and the defendants excepted. It was admitted by the plaintiffs' counsel that John White, jun., had been arrested and was then imprisoned upon an execution duly issued by the attorney general, upon a judgment recovered by the state against the said John White,

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jun., for the sum of \$28,444.92, being the same money for the recovery of which this action was brought. The counsel for the defendants then moved the court to nonsuit the plaintiffs, on the ground that the imprisonment of the defendant John White, jun., on the execution issued on the judgment in favor of the state was a satisfaction of the judgment, and on the further ground that the defendant John White, jun., was not liable for a second judgment for the same cause of action. The court overruled the motion, and the counsel for the defendants excepted to the decision.

The testimony being closed, the counsel for the defendants renewed the motion for a nonsuit, upon each of the grounds before stated, and on the further grounds, that it now appeared in proof that the bond had never been filed in the office of the county clerk, and consequently there had been no delivery of the bond. The court denied the motion, and the counsel for the defendants excepted. The judge charged the jury, among other things, that, as a question of law, when the bond was brought to the board of supervisors for their approval, and was approved by them, it was a sufficient delivery to bind all who signed it; and that, as a matter of law, the persons who signed the bond were bound by it, although it never got into or was filed in the county clerk's office. To this charge the counsel for the defendants excepted. The counsel for the defendants requested the judge to charge the jury that, as matter of law, there was no legal evidence of the delivery of the bond, and therefore the plaintiffs could not recover; that there was not sufficient evidence to authorize them to find that the bond was delivered; that there was no evidence in the case that John White or Harrison, or either of them, signed and sealed the bond; nor any evidence to authorize the jury to find a verdict against them, or either of them. The court refused so to charge, and the counsel for the defendants, in due form of law, excepted to the decision in each particular.

The jury found a verdict against the defendants for \$30,000 ;

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and from the judgment entered thereon, the defendants appealed.

*James Wood, jun.*, for the appellants.

*Scott Lord*, for the plaintiffs.

*By the Court*, T. R. STRONG, J. It was not necessary to allege in the complaint the loss of the bond, to entitle the plaintiffs to prove its loss and give secondary evidence of its contents. Under the former system of pleading, in cases like the present, profert of the bond, or, an excuse for the omission of profert, in the declaration, was required, and if the declaration contained the usual statement of profert, and the defendant pleaded *non est factum*, the production of the bond at the trial could not be excused by proof of its loss previous to declaring; but the doctrine of profert has no place in the present system of pleading, ample provision otherwise existing for the production and inspection of papers. Independent of profert, there never was any necessity or reason for saying any thing about the loss of the bond, in stating the cause of action.

The evidence of the loss of the bond is not very strong, but I think it is sufficient. A witness, who was the clerk of the plaintiffs when the bond was taken, testified that he recollected the approval of the bond by the plaintiffs; that he thought it was in the evening; and that he thought he handed the bond to the county clerk or his deputy the next morning. On his cross-examination he testified, he did not recollect the act of handing the bond to the county clerk. Being re-examined, he testified his recollection was strongest that the bond was handed to Orton. Orton was the clerk of the county. The fair construction of this testimony, I think, is, that the witness had a recollection that he delivered the bond to the county clerk, and believed he had done so, but was not entirely confident of the fact. It was the duty of the plaintiffs

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to have the bond filed in the office of the county clerk ; their clerk would naturally be charged with that duty ; and a presumption of some force may be indulged that this duty was performed. The testimony of the clerk, in connection with this presumption, I consider reasonable proof that the bond was filed in the county clerk's office ; and it is not overcome by the testimony of Orton, that he did not, to his knowledge, receive the bond, and that it was not in the county clerk's office, to his knowledge. The substance of the testimony of Orton is, that he had no recollection on the subject ; which is mere negative testimony. The testimony of Root, who succeeded Orton as county clerk, that the bond was not in the office on the 2d day of August, 1856 ; that he had searched before the meeting of the board of supervisors in June, 1856 ; that he searched several times ; that the bond could not be found in his office ; and that he had no recollection of having seen the bond in his office, is reasonable proof that the bond was not in that office at the time of the trial.

No error, in my opinion, was committed in overruling the motion for a nonsuit. The question raised upon the motion, as to the loss of the bond, has been sufficiently considered. In regard to the execution of the bond, it is proved as to part of the defendants, John White, jun., John White and Henry F. Hill, by the testimony of witnesses acquainted with their handwriting, and who had seen their names to the bond, that they thought the names their signatures ; and as to the other defendants, Harrison and Bond, witnesses on the part of the plaintiffs testified, that their names were to the bond, and that those defendants admitted they were bail for John White, jun., the treasurer. The clerk of the plaintiffs, before referred to, testified, that his recollection was that the bond was sealed ; but, without any direct evidence on that subject, the fact of seals being affixed might well be inferred from the instrument being presented as a bond, which implies a sealed obligation (*McBurney v. Cutler*, 18 Barb. 203.) It is proved that the bond was presented to the plaintiffs, and that

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it was satisfactory to them. This was sufficient evidence of a delivery. Neither the indorsement of approval, nor the filing of the bond, was necessary to a delivery. They are acts which might be performed subsequently. I am satisfied that the evidence was ample to call for the submission of the question of execution to the jury.

The judgment in favor of the people against John White, jun. in an action for the recovery of the same moneys for which this action was brought, and the imprisonment of the defendant by virtue of an execution on that judgment, are not, I think, any defense to this action. It is proved that the bond was conditioned, as required by the statute, for the faithful execution of the duties of the office of treasurer, and the payment according to law of all moneys which should come to the hands of the treasurer, and for rendering a just and true account thereof, "to the board of supervisors, or to the comptroller of this state, when thereunto required." (1 R. S. 863, § 81, 5th ed.) By § 99, (p. 865,) "whenever the condition of the county treasurer's bond shall be forfeited, to the knowledge of the board of supervisors of the county, and whenever such board shall be required to do so by the comptroller, they shall cause such bond to be put in suit." Sections 47 and 48, (p. 926, same ed.) provide for a statement by the comptroller, of the accounts of the county treasurer on the first day of May, annually; and that if any county treasurer shall refuse or neglect to pay the balance of any state tax unpaid by him, the comptroller shall deliver a copy of such county treasurer's account to the attorney general, "who shall prosecute forthwith; and the state shall be entitled to recover the balance due with interest," &c. By § 49, "the comptroller may also, in his discretion, direct the board of supervisors of the proper county to institute one or more suits on the bond of such treasurer and his sureties." All losses sustained by the default of the treasurer of any county are chargeable to such county, (§ 61, p. 928.) These provisions appear to contemplate a double direct liability by the

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county treasurer; one by him individually to the state, so far as the state tax is concerned; and the other by him, in connection with his sureties, to the county, on his bond, embracing the entire duties of the treasurer; upon each of which liabilities an action may be maintained. It is the duty of the board of supervisors, for the protection and security of the interests of the county, to cause the bond to be put in suit upon knowledge of a forfeiture; and it is the duty of the attorney general, in regard to the interests of the state, to prosecute the county treasurer forthwith upon receiving from the comptroller a copy of such county treasurer's account, showing a balance of a state tax unpaid by him. These are separate and distinct causes of action, although the object may be the recovery of the same money; the former arising upon the bond, and the latter upon the statute. Actions to enforce them may proceed concurrently until payment is obtained; neither, before payment, constituting any defense to the other. The imprisonment of the treasurer at the suit of the state does not affect, in any way, the action at the suit of the county. Such an imprisonment is not a satisfaction of the liability which is the subject of that action.

The defendants were precluded by their stipulation, admitting the balance due from the county treasurer, from controverting that fact; hence extracts from a report of a committee of the board of supervisors on the treasurer's accounts previous to the stipulation, showing a balance due the treasurer, which report was accepted by the board, but does not appear to have been further acted upon, was inadmissible as evidence of payment of the moneys in question. And there is no force in the position that the mere fact of the report of the committee, and its acceptance by the board of supervisors, is an estoppel *in pais* in respect to the sureties, preventing the board from asserting any claim against them contrary to the report. It does not appear that the sureties have

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done, or omitted, or suffered, any thing by reason of those proceedings.

The charge of the court to the jury was correct, for reasons already stated; and the court did not err in refusing to charge that there was not sufficient evidence to warrant their finding that John White or Harrison executed the bond; or that the bond was delivered. The only evidence on that subject, additional to what has been referred to, is the testimony of Harrison and John White, in substance that they signed the bond of John White, jun. as treasurer, for his first term, but did not to their recollection sign any bond for him as treasurer subsequently. The evidence is of a negative character, the force of which it belonged to the jury to consider, in connection with the other evidence on the question of execution and delivery. The judgment must be affirmed.

Judgment affirmed.

[MONROE GENERAL TERM, September 5, 1859. *T. R. Strong, Smith and Johnson*, Justices.]

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 PIERSON vs. SAMUEL MOSHER and ARVID MOSHER.

Where a division fence between adjoining owners has been in existence, and acquiesced in by the parties as on their dividing line, for more than forty years, the law will determine the line of such fence to be the true line between the parties. And this, notwithstanding the fence was originally put up under an agreement that it was to be altered at some future time, in case it should be found, upon actual survey, not to be on the true line.

In such cases, it is the long acquiescence which renders the practical location conclusive.

**T**HIS action was commenced in this court to recover possession of a strip of land. It was tried at the Cayuga circuit, before Judge DAVIES and a jury, in October, 1858. The plaintiff and defendants own lands adjoining each other. In April, 1815, John Owen, under whose title the plaintiff claims,

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purchased of Humphrey Sharpsteen the west half of fifty acres of land, then in the township of Milton, now in the town of Genoa. The defendant Samuel Mosher, at the same time, purchased of the same grantor the east half of the same fifty acres. In the same month, Owen and Mosher divided the land between them, and fixed the place for the division fence. Each occupied up to that line until the fence was removed by the defendants in 1857. This was the plaintiff's case. The defendants proved that at the time the fifty acres was divided between Mosher and Owen, in 1815, it was divided as follows: "They cut a rod pole and measured off the land, and built the fence through, north and south, upon the line between them, as high as they could come at it; and at the same time they agreed that whenever they could get a surveyor they would have the land run out, and put the fence on the true line, as the surveyor should run it; that when they measured through they could not tell where the east line of the fifty acres was, and they guessed at it." The defendants also offered evidence tending to prove that those occupying the premises now owned by the plaintiff were from time to time told, by those owning the other half, that the line was unsettled, and that Pierson, the plaintiff, still got more than one half the fifty acres. The court charged the jury that if they were satisfied, from the testimony, that the line fence was established in 1815, and had been maintained down to 1857, the defendants were precluded, upon the principles of public policy, from setting up or insisting upon a line in opposition to one which had been steadily adhered to upon both sides for more than forty years. That if necessary, in order to establish this line, the law would presume a conveyance in accordance with it. This long acquiescence was proof of so conclusive a character that the defendants were precluded from offering any evidence to the contrary. That parol testimony to change a boundary line, after so long an acquiescence in its location, would counteract the beneficial effects of the statute of frauds, and render the title to real property alarmingly insecure. To which propositions

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the counsel for the defendants excepted. The court further submitted to the jury the following questions, to wit: Was the line fence, put up in 1815, on the division of the fifty acre lot, kept up as thus erected, for more than forty years, and for that time was it acquiesced in by Mosher? And also charged the jury that if they found said question in the affirmative, they would find a verdict for the plaintiff. To which direction and charge the counsel for the defendants also excepted; and the counsel for the defendants requested the court to charge the jury as follows: 1st. That if they (the jury) should find, from the evidence, that the fence was originally put up under an agreement that it was to be altered at some future time, in case it should be found, upon actual survey, not to be upon the true line, then there was no adverse possession, as against Mosher, until such actual survey made, or notice given to him that the other party claimed the fence to be on the true line. But the court refused so to charge; and to that refusal the counsel for the defendants excepted. The said counsel further requested the court to charge said jury: 2d. That in order to evince acquiescence on the part of the defendant Mosher, there must be proof of some affirmative act in that respect on the part of Mosher. But the court refused so to charge; and to such refusal the counsel for the defendants also excepted.

The jury found a verdict in favor of the plaintiff; and the defendants, upon exceptions ordered to be heard in the first instance at a general term, moved for a new trial.

*Wright & Pomeroy*, for the appellants.

*N. T. Stephens*, for the plaintiff.

*By the Court*, T. R. STRONG, J. From the manner in which this case was submitted to the jury by the charge, the verdict must be deemed to establish that the line fence built in 1815, on the division of the fifty acre lot, was kept up and acquiesced in by Mosher, the owner of the east half, for more than

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forty years. Now assuming that the fence was originally put up under an agreement that it was to be altered at some future time, in case it should be found, upon actual survey, not to be on the true line, that would not vary the law of the case. The agreement as such would have no force in reference to fixing the line; each party would have the same right to remove the fence, without as with the agreement; and the agreement could have no effect, except as evidence upon the question of acquiescence in the line as then adopted, and on which the fence was placed. The facts of the existence of the fence as a line, and the acquiescence in it as such for such a length of time being proved, notwithstanding the agreement, the law would determine the line of the fence to be the true line between the parties.

It is the long acquiescence which renders the practical location conclusive. In *Baldwin v. Brown*, (16 N. Y. Rep. 359,) the court say, "the acquiescence in such cases affords ground, not merely for an inference of fact, to go to the jury as evidence of an original parol agreement, but for a direct legal inference as to the true boundary line. It is held to be proof of so conclusive a nature that the party is precluded from offering any evidence to the contrary. Unless the acquiescence has continued for a sufficient length of time to be thus conclusive, it is of no importance. The rule seems to have been adopted as a rule of repose, with a view to the quieting of titles; and rests upon the same reason as our statute, prohibiting the disturbance of an adverse possession which has continued for twenty years." In all cases in which practical locations have been confirmed upon evidence of this kind, the acquiescence has continued for a long period, rarely less than twenty years.

No error, therefore, was committed by the refusal to charge as requested; and the charge was fully warranted by the case cited.

The fact of the plaintiff having removed the fence on the south side of the fifty acres, to conform to the survey of the

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south line made in 1857, had not, I think, any materiality in this case. It would not have tended to prove any thing as to the line between the east and the west half of the fifty acres, or on the question of acquiescence in the line, according to the fence.

It follows that a new trial should be denied.

[MONROE GENERAL TERM, September 5, 1859. *T. R. Strong, Smith and Johnson*, Justices.]

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## PRICE vs. THE LYONS BANK and ROBERT B. SUTTON.

Where payees residing in the country, of promissory notes payable at a bank in Albany, consent to renew the same, at the request of the maker, on condition that he shall give a new note, payable in Albany, and pay the discount, with one half of one per cent in addition, for the difference of exchange between the two places, which is accordingly done, the transaction is not *usurious*. JOHNSON, J. dissented.

The fact that the renewal note is made payable at an Albany bank—even if it was the intention of the parties to secure to the payees more than legal interest—will not affect the law of the case; it being lawful to exact the actual difference of exchange on the amount of the note, whatever was the intention in making the exaction.

**A** PPEAL from a judgment entered upon the report of a referee. The action was brought to set aside, and have given up to be canceled, a bond and mortgage, made by the plaintiff to Sutton, one of the defendants, on the ground of usury. The Lyons Bank was an individual bank; Parshall & Westfall, as copartners, being the owners thereof, and conducting the business of banking, at Lyons, under the name and style of the "Lyons Bank." Parshall & Westfall put in an answer in their own names, and on the trial the complaint was amended, substituting them as defendants in the place of the Lyons Bank. It was claimed on the trial, and evidence was given tending to prove, that the bond and mortgage belonged to Parshall & Westfall from the beginning, and was

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taken by them in the name of Sutton, to avoid the defense of usury. The consideration of the mortgage was the amount due on two promissory notes of \$750 each, given by the plaintiff to Parshall & Westfall, with the interest thereon, and the costs of a suit commenced on these notes, and about \$400 in money. To show that the consideration of the mortgage was usurious, the plaintiff proved that on the 6th of November, 1855, Parshall & Westfall held three promissory notes, previously discounted by them, against the plaintiff; two for \$1000 each, and one for \$2000, and all payable in the city of Albany. One of the \$1000 notes became due on the 31st of October, and was protested; the other \$1000 note became due on the 8th of November, and the \$2000 note became due on the 6th of November. On that day the plaintiff made an arrangement with Parshall & Westfall to renew the two last mentioned notes; and by that arrangement he was to give a new note for \$3000, payable in Albany at 22 days, and to pay the discount with one half per cent exchange, and the notes were to be ordered back from Albany, where they had been sent for collection, and surrendered to the plaintiff. The agreement was carried out. When the \$3000 note became due, a further renewal was agreed on; and by this agreement the plaintiff was to pay \$300 in money, and give three notes, one for \$700, payable at 15 days, and two for \$1000 each, payable at 30 and 45 days, in the city of Albany. The plaintiff was to pay the discount, and one half per cent exchange, and the \$3000 note was to be ordered back as before, and surrendered to the plaintiff. The agreement was carried out, and the notes made as above stated. These three notes were subsequently and successively renewed, partial payments being made, until two notes of \$750 each were given, and which became due in October, 1855. These notes were protested, and a suit was instituted by Parshall & Westfall upon them, which was discontinued. Subsequently a suit was brought upon the same notes, in the name of one Graham; Parshall being one of the plaintiff's attorneys. In this suit Price put in an

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answer, without oath, denying generally the allegations of the complaint. This suit was discontinued when the mortgage was given; the notes and costs of the suit, as before mentioned, constituting part of the consideration of the mortgage. The defendants offered in evidence the defendants' answer in the case of *Graham v. Price*, which was objected to, and the objection overruled, and the plaintiff excepted.

After the testimony on the part of the plaintiff had closed, the defendants moved for a nonsuit, on the following grounds: That the discounting the note and purchasing the draft of \$1000 on the 5th January, 1856, was a new and independent transaction, and had no relation to, or connection with, the former dealings between the plaintiff and the defendants Parshall & Westfall. It was an ordinary and legal transaction; and the fact that the plaintiff applied the draft to the payment of the note due at the Albany City Bank, February 21, 1856, does not in any manner connect it with the note so due. When the plaintiff received the drafts from these defendants, he could do with it as he pleased, and could either apply it to the payment of that note, or use it in his business, or in the payment of any other debt. So in relation to the discount and purchase of the draft on the 21st day of January, 1856, and to all the subsequent discounts and drafts. The settlement of the suit commenced by Graham, and the agreement thereupon to pay the notes upon which the suits were commenced, and the costs, was an admission by the plaintiff of the validity of the notes; and he cannot afterwards set up any defense to the securities taken in such payment, by reason of any defect or illegality in the inception of the notes. The settlement of the subject matter of the action between the parties is conclusive. It is the same as a trial and judgment upon the matters litigated, and a note, as any other security given by a party in such settlement, is valid, notwithstanding any defenses which might have been set up to the action, or have been established on the trial. And in this case, if the plaintiff, on the settlement, had given Graham his

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own promissory note for the amount of the two notes in suit, together with the costs of the action, such note would be valid, and the plaintiff, in an action for its recovery, would not be permitted to set up any defense which might have been made to the two notes: the settlement is an estoppel, and the plaintiff cannot go back of it. The referee granted said motion, and nonsuited the plaintiff.

*S. Mathews*, for the appellant. I. The note for \$3000 of the 6th of November, 1855, was clearly usurious. There was paid for the loan and forbearance of this sum, for 25 days, \$29 and upwards, or a little more than 14 per cent. The three notes given in renewal of the \$3000, namely, one of \$700 and two of \$1000 each, were also usurious. The two transactions were substantially alike, and in both cases the holder realized more than 14 per cent for the loan. (*Seneca County Bank v. Schermerhorn*, 1 Denio, 133.)

II. The two notes of \$750 each, which formed the principal part of the consideration of the bond and mortgage in question, having been given in renewal of the above mentioned usurious notes, were also usurious, and rendered the security given in consideration thereof, void. (*Beed v. Smith*, 9 Cowen, 647.)

III. The evidence was quite clear that Sutton had no interest in the bond and mortgage. The declarations of Sutton, in connection with the other circumstances in the case, establish it; and the evidence is equally satisfactory that Graham never had any interest in the notes, but that they were sued for the benefit of Parshall & Westfall.

IV. But whether the notes had been transferred to Graham or to Sutton, or not, that circumstance cannot change or affect the rights of the plaintiff. (1.) The notes, being usurious, were void in the hands of either of those parties; and they having been transferred after due, the holders are chargeable with notice of every defense which the plaintiff could have made against Parshall & Westfall. They were not innocent

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holders, and any security taken by them for the notes would be just as invalid as if taken by Parshall & Westfall. (2.) Parshall acted throughout as the agent and attorney of Graham and of Sutton. Parshall had notice of all the facts, and notice to him was notice to his principals. (*Story on Agency*, § 140.)

*O. H. Palmer*, for the defendants. I. The notes of August 13th, and September 16th, 1856, for \$750 each, were not, nor was either of them, usurious. If the action was by Parshall & Westfall against Price upon the notes, the facts proved would not sustain the defense of usury. No corrupt or usurious agreement is shown, and none is to be presumed. By the testimony of Price, it appears that he was indebted in the sum of \$4000, all of which was payable in Albany at the time of his application for discount of the \$3000 note, dated 6th of November, 1855. The application for this discount was between the 1st and 5th of November. Only \$1000 of the \$4000 was then due. Westfall told him he must pay the \$1000 note soon, and he would extend the others 22 days; that if he would send a new note for \$3000, payable in Albany, and the discount and exchange on the \$2000 to mature 6th November, and on the \$1000 note to mature 8th November, he would send and get these notes; that Westfall gave him to understand he could not discount notes payable at the Lyons Bank. There is no proof of any agreement whatever at the time the notes were discounted. Price attempts to make out a condition, but the statement is altogether loose and vague. (*Curtis v. Masten*, 11 *Paige*, 15. *Lane v. Losee*, 2 *Barb. S. C. R.* 56.) The case nowhere shows that it was made a condition of the discount that drafts should be purchased. There was an actual indebtedness which Price was liable to pay, even if the two \$750 notes were usurious. There being a valid indebtedness at the time the \$3000 note was discounted, the most Price could claim, in equity, would be to have whatever usury he has paid, if any, under subsequent usurious

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agreements, applied in reduction of the original debt. (*Crane v. Hubbel*, 7 *Paige*, 413.)

II. The suit being brought by Graham upon the notes, and issue having been joined, and subsequently settled, the amount paid and satisfied, and the notes surrendered and canceled, Price is for ever after estopped from setting up a defense in respect to the notes.

T. R. STRONG, J. The notes of the plaintiff, for \$3000, one due the 6th and the other the 8th of November, 1855, which were renewed the 6th of that month, were payable at the Albany City Bank, and were at the time of the agreement for their renewal, between the 1st and the 5th of November, at the latter bank for collection. It appears by the complaint, that when the agreement for renewal was made, the rate of exchange between Lyons, the place of business of the Lyons Bank, and Albany, was one half of one per cent in favor of Albany. Payment of the notes at that time, at the place specified therein for payment, would have secured to the Lyons Bank the benefit of that difference of exchange, and these notes might therefore be regarded as practically worth that difference beyond the sums payable by their terms. The bank could not have enforced by action payment of the notes at Albany, nor recovered any thing as damages for not paying them there; but nevertheless it was lawful to make them payable at that place; in the ordinary course of business they would be paid there at maturity; and the bank might deal with the plaintiff in respect to them upon the assumption that they would be paid at the time and place provided for payment. It might treat them as equal in value to the amount of the notes at Albany, estimating their value according to their terms. No objection of usury in thus dealing with the notes could be made, as they were actually worth so much upon the assumption mentioned. Like notes providing for the payment of interest upon interest to accrue, the law would not compel payment at Albany in the one case, nor of the

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interest upon future interest in the other; but in neither case is the stipulation to do so illegal, and in each the parties may voluntarily pay and receive payment and deal in accordance with it. But it is unnecessary to discuss the subject further on principle, as it is fully settled by authority that charges for difference of exchange between different points, in such cases, are lawful. (*Merritt v. Benton*, 10 *Wend.* 116. *Williams v. Hance*, 7 *Paige*, 581. *The Ontario Bank v. Schermerhorn*, 10 *id.* 109. *The Cayuga Co. Bank v. Hunt*, 2 *Hill*, 635. *Oliver Lee & Co.'s Bank v. Walbridge*, 19 *New York Rep.* 134.)

The circumstance that the notes on the renewal were also to be payable at the Albany City Bank, even if it was the intent of the parties to the transaction to secure to the Lyons Bank more than legal interest, does not affect the law of the case. It was lawful to exact the actual difference of exchange on the amount of them, whatever was the intention in making the exaction; and requiring the notes on the renewal to be payable in Albany, although the rate of exchange at the time was in favor of that city, did not in law secure to the bank any pecuniary benefit, and therefore the intent of the requirement was immaterial. That the rate of exchange would be the same, and in favor of the same place, at the maturity of the notes, as when they were made, was too uncertain to be the basis of a legal adjudication. These views are fully sustained by the court of appeals in the recent case of *Oliver Lee & Co.'s Bank v. Walbridge*, above cited.

The transaction of the subsequent renewal, on or about the 5th of December, was of the same legal character with that already considered; and in the view taken of the case the other questions raised by the plaintiff are unimportant.

It follows that the judgment should be affirmed with costs.

E. DARWIN SMITH, J. As I perceive that my brethren do not agree in this cause, and the responsibility of deciding it is in effect necessarily cast upon me, I have deemed it my duty,

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considering its importance in point of principle, to look into the case with some care, and to express my own views in respect to the questions presented for our consideration. It seems that on the 6th of November, 1855, the plaintiff was indebted to the Lyons Bank in the sum of \$4000, upon three promissory notes, payable in Albany, of which one for \$1000 was past due and protested, one for \$2000 was due on that day, (the 6th,) and one for \$1000 was due the 8th of the same month. On that day the plaintiff gave a new note for \$3000, at 22 days, payable also at Albany, to renew the two last mentioned notes, paid the discount on this note and one half of one per cent exchange on the said two notes, and the same were ordered back from Albany by the bank, and delivered up to the plaintiff; the notes then being the property of the bank, and having been sent by it to Albany for collection and payment. Here was a discount made to take up paper, payable in Albany, then held by the Lyons Bank, and in addition to the discount one half of one per cent was exacted, paid and received by way of exchange, making \$15 over and above the legal rate of interest. This \$15 was received to pay the exchange on the two notes then in Albany, becoming due, and this, it appears, was at that time the difference of exchange between Lyons and Albany, and that sum would be requisite to purchase at Lyons a draft on Albany to meet these notes. The plaintiff could not legally have been required to pay this exchange, but having made his notes payable in Albany, he could only perform his contract by sending the money there, by draft or otherwise, to meet such paper. In the absence of any statute applicable to this class of banks, on the subject of selling drafts to pay their own paper payable at another place, (*International Bank v. Bradley*, 19 N. Y. Rep. 245; *Leavitt v. Blatchford*, 17 id. 521,) I do not see why the Bank of Lyons might not sell the plaintiff a draft on Albany for \$3000 to meet his note, and receive from him the usual premium on such draft; and if this be so, I do not see why the bank might not receive the exchange and undertake to procure the

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notes from Albany for the plaintiff; and this was really what was done on this occasion. The \$15 was not paid or received on the discount of the \$3000 note, and its payment does not in any way affect the validity of this note. On the maturity of this \$3000 note it was not paid, but new notes were discounted at the bank; one for \$700 at 15 days; one for \$1000 at 30 days; and one other for \$1000 at 45 days, and \$300 paid in cash, and the discount on these notes was paid, together with exchange on the \$3000 note, at Albany as before. These notes were subsequently renewed, and the exchange paid, and the same mode of proceeding by repeated renewals continued till the debt was reduced to the two notes for \$750 embraced in the mortgage in controversy in this action. Through the process of these various renewals the  $\frac{1}{2}$  of one per cent on the amount of these notes respectively was repeatedly taken, paid and received in the manner aforesaid, by the name and claim of *exchange* between Lyons and Albany, over and above the legal rate of interest. In this way the bank received, and the plaintiffs paid, on the \$3000 loaned and on the amount of the debt remaining unpaid, at all times over 14 per cent upon the amount of the loan, for the period of about nine months. This is palpable upon the face of the transaction. Upon these facts, connected with the testimony of the plaintiffs that the several discounts of the notes aforesaid were made upon the express agreement or condition, imposed by the bank, that the said notes should thus be made payable in Albany, I should have supposed before the case of *Oliver Lee & Co.'s Bank v. Walbridge*, in the court of appeals, (19 N. Y. Rep. 134,) that this was a plain and palpable case of usury, and that the repeated renewals of the plaintiff's paper at short dates, with the payment of exchange to the bank at Lyons on such renewals, was a mere contrivance or device to evade the statute and secure more than the lawful rate of interest on the money loaned. But the only basis for the allegation of usury in the transaction would, in my view, consist in making it a condition of such discounts that the paper should be payable

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in Albany, with the intent on the part of the plaintiff to pay, and of the bank to secure and receive, the difference of exchange between Lyons and Albany. If the case were stripped of this feature, there could be no pretense of usury in the transaction. But if the original contract for the discount of these several notes so payable was lawful when made, and not infected with usury by reason of any such condition or agreement—and this must be so if it was as lawful to make them payable in Albany as at Lyons—the notes could not become invalid afterwards; and it cannot violate the law to pay the paper promptly, at maturity, at its place of payment, or to furnish funds to the bank to make such payment, and for the bank to receive the same. In the case of *Oliver Lee & Co.'s Bank v. Walbridge*, (*supra*,) it is expressly held that it is not unlawful for a bank to make it a condition of a discount that the paper shall be payable at some other place in the state, with the express object, view and intent of both parties to secure to the lender the difference of exchange between the two places, over and above legal interest. Under this decision all the various notes given by the plaintiff, as detailed in the evidence in this case, payable at Albany, and all the renewals thereof, were entirely lawful and valid; each renewal being a discount of new and valid paper. The bank was of course entitled to receive payment at Albany and to receive the exchange or difference in value between money at Lyons and money at Albany, if the debtor voluntarily paid it at Lyons instead of sending the money to Albany. And the lawfulness of the transaction cannot depend upon the time the paper had to run. Some of this paper was payable in 15 days, some at 22, and some at 30. The shortness of the paper could not affect its validity. It would, on the 15 day paper, enable the lender, it is true, at one half per cent exchange, to make one per cent a month in addition to legal interest; but according to the decision in the case of *Oliver Lee & Co.'s Bank v. Walbridge* this is entirely lawful. According to that decision, the receipt of such extra amount by way of exchange, over and

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above legal interest, is not the receipt or reservation of more than seven per cent interest on the loan and forbearance of money, and the process by which its payment is secured is not, and cannot be regarded, a *device* or *contrivance* to evade the statute. Under this decision, which is of course binding upon us as authority, however much we may doubt its soundness, (and I am by no means convinced of its correctness,) I can see no ground upon which to hold that the mortgage in this case is usurious. The judgment of nonsuit, therefore, was rightly rendered by the referee, and the judgment should be affirmed.

JOHNSON, J., (dissenting.) I am entirely unable to see why the transaction of giving the \$3000 note was not clearly usurious. It was given in renewal of former notes, about to fall due, and was in substance and legal effect but the extension of the time of payment of a pre-existing indebtedness. It was nothing more nor less than a forbearance of the day of payment twenty-two days, with the three days of grace to be added. The notes about to fall due were payable at the Albany City Bank, and as a condition of the forbearance, the plaintiff was required to make, and did make, the new note payable at the same place, and to pay the legal discount, and one half of one per cent in addition, which was called the exchange. This was repeated upon several subsequent renewals, and as long as the renewal notes continued to be made payable at the same bank. At some of these renewals, the extension of time was only fifteen days, when the payment of one half of one per cent called exchange would be at the rate of twelve per cent a year in addition to the legal interest. The result of all these renewals, through a period of several months, was to give the lender, for this forbearance, over fourteen per cent for the use of his money. If this is not usury the statute may as well be repealed at once, or declared inoperative and void by our courts. The case cannot fairly be distinguished from that of *The Seneca County Bank v. Schermerhorn*, (1 Denio, 133.) That was the case of the renewal of a note, and as a condition

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of the extension, the borrower sold to the lender a draft at par, which was worth one half of one per cent premium. The correctness of that decision has never, that I am aware of, been questioned, and it seems to me to apply with full force to the renewal notes from which the mortgage in question sprung. It was said upon the argument, that a note given in renewal of another note is an independent transaction, and not an extension, or forbearance of the day of payment. But this, as was said by Bronson, justice, in the case last cited, "involves a distinction which I cannot see, and which I think none but a usurer can comprehend." And unless I have entirely misapprehended the true character of this transaction, it would puzzle an individual of that character even, however skillful and astute in financial matters, to explain to the satisfaction of one of only common understanding, how there could be such a thing as a difference in exchange between two sums of money, or two obligations, payable at the same place, as were these several notes. There can be no such thing in fact, and I think nothing of the kind exists in commercial usage, and calling it by that name is but a stale and transparent pretense, for an unlawful exaction. It is a common device, in such transactions, to endeavor to hide an unlawful exaction, under some fair and harmless name. I cannot agree with my brethren in the opinion that this case falls within the principle established by the court of appeals in *Oliver Lee & Co.'s Bank v. Walbridge*, (19 N. Y. Rep. 134;) and feel constrained to protest against such an application of the rule there laid down. That case, as I understand it, was determined upon the ground that by the law of the contract, where the lender only required the borrower to pay the amount loaned to his agent, at any other place within the state than that where the loan was made, with legal interest, nothing but legal interest was embraced in the stipulation, and usury could not be predicated upon it, although the sum paid might be worth something more at the place of payment, to parties residing at the place where the loan was made.

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As a tender or payment of the precise sum agreed upon, with legal interest, by the borrower to the lender, wherever he might be found, in coin, would discharge the obligation the moment it became due, and nothing more could be recovered should the entire contract be enforced by action, it was held that there could exist no usurious element in such an agreement. It seems to have been considered by the court that any premium, or rate of exchange, existing in favor of one point, within this state, against another, at the period of the making and delivery of a time note, although such note might be made, and accepted, with a view and for the express purpose of securing this difference to the lender at the day of payment, yet such anticipated profit was so speculative and unreal in its character, and the course of exchange so uncertain in respect to its continuance in that direction, for any length of time in future, that the arrangement could not, legally speaking, be regarded as securing such premium to the lender, or any profit whatever beyond legal interest, irrespective, wholly, of the statute.

This is precisely what was decided by a majority of this court in *Cuyler v. Sanford*, (13 Barb. 339,) and which decision has ever since been followed in this district.

This must now be regarded by the profession, and by the courts, in this state at least, as a settled and sound legal proposition, although we may still expect practical bankers and dealers in exchange to reason differently, and under the shield of this rule, to continue to accumulate large and substantial gains and profits, beyond the legal rate of interest, by practicing upon a theory directly opposite. But this is no such case. No room was left in the arrangement in this case, for the operation of any contingency, to defeat anticipated profits. The legal myth, or fiction, of the rate, or premium of exchange, as it seems to be regarded, when resting in expectation only, was here reduced to the palpable and unmistakeable reality of a cash payment, exacted and handed over in advance, and as a condition precedent to the forbearance. If this is not usury,

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I can scarcely conceive of a case that would be. In this respect the case at bar differs essentially, and radically, as I conceive, from the two cases above referred to. Had the plaintiff, in the case of the *Oliver Lee & Co.'s Bank v. Walbridge*, required not only that the note should be made payable in New York, but that in addition to advancing the legal discount, the borrower should also, as a condition of the loan, pay in advance the half per cent premium of exchange which was expected to accrue to the lender's benefit at the maturity of the note, the case would have been precisely analogous to the renewal notes in question. In such a case, it seems impossible that the court of last resort could decide as they did in the case cited. Indeed the whole reasoning of the court, in that case, would inevitably lead to a conclusion just the reverse, in the case supposed. It is not pretended by my brethren but that the strong and controlling tendency of the evidence, before the referee, when the plaintiff rested his case, was to prove that the mortgage in question, although made to the defendant Sutton, was the direct offspring of these notes. They rest their decision exclusively, as I understand them, upon the authority of the decision referred to in the court of appeals. As that case, in my judgment, does not control, or in any respect affect this, I am of the opinion that the judgment should be reversed, and a new trial ordered.

Judgment affirmed.

[MONROE GENERAL TERM, September 5, 1859. *T. E. Strong, Smith and Johnson*, Justices.]

MARY CROWLEY, adm'x, &c. vs. THE PANAMA RAIL ROAD  
COMPANY.

No action would lie, at common law, in this court, against a corporation created by the laws of this state, for causing the death of an individual in another state or country, by the negligence and unskillful conduct of its agents and servants, even if the death occurred in this state.

Nor will such an action lie, since the passage of the acts of the legislature, of 1847 and 1849, giving a right of action to the next of kin of persons killed by the wrongful act, default or neglect of another; in the absence of any clause in the defendant's charter subjecting the corporation to the operation of those acts, as a part of the condition of its being.

Those statutes are purely *local*, and limited to the sovereignty and dominion of the state; and they only apply when the subject matter of the action arose within the state.

Where a complaint alleged that on &c., at the city of New York, for a reasonable compensation paid by B., the plaintiff's intestate, the defendant, a corporation chartered by the laws of New York, agreed to convey B. over its rail road from Aspinwall to Panama, in New Grenada; that the defendant subsequently received B., on its rail road, at A.; and its servants and agents so negligently and unskillfully conducted themselves in the management of the said rail road that through such negligence B. was killed while a passenger in one of the defendant's cars; *Held*, on demurrer, that the action would not lie, it not being founded upon the contract, but upon a tort, committed in another country, the right of action for which did not survive, and for which the court had no jurisdiction under the acts of 1847 and 1849.

The cause of action under the acts of 1847 and 1849 is a new and original one, given by, and depending wholly upon, the statute.

**A**PPEAL from a judgment entered at a special term, on demurrer to the complaint. The action was brought by the plaintiff as administratrix of Bartholomew Crowley deceased. The complaint set forth the plaintiff's appointment as such administratrix, by the surrogate having jurisdiction, and alleged that the defendant was a corporation created by act of the legislature of the state of New York, passed April 7, 1849, entitled an act to incorporate the Panama Rail Road Company, and at the times hereinafter mentioned, being such corporation, was proprietor of a certain rail road known and designated as the Panama rail road, in the republic of New

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Grenada, and engaged in transporting passengers thereon for hire as a common carrier. That on or about the 24th day of April, 1856, at the city of New York, for a reasonable compensation paid to the defendant by the said Bartholomew Crowley, the defendant agreed to carry the said Bartholomew over their said rail road from Aspinwall to Panama, when he the said Bartholomew should thereafter arrive at Aspinwall, in the steamer then next ensuing; and that immediately after the arrival of the said steamer, to wit, on the 6th day of May, 1856, at Aspinwall aforesaid, the defendant received the said Bartholomew into one of its passenger cars for the purpose of carrying him therein as a passenger from Aspinwall to the city of Panama, in the republic of New Grenada aforesaid. That the servants and agents of the defendant so negligently and unskillfully conducted themselves in the management of the aforesaid rail road, and of the said train of cars, into one of which the said Bartholomew had been received as a passenger, that through and by reason of the negligence and unskillfulness of the defendant's said servants and agents in conducting the aforesaid train of cars, in one of which the said Bartholomew had been received, and then was a passenger to be conveyed as aforesaid, and through the negligent and unskillful conduct of the defendant's servants and agents in the management of the road, the said Bartholomew then and there lost his life. That by reason thereof, the plaintiff, the widow of the said deceased, and his next of kin, had suffered damage to the amount of \$5000; wherefore the plaintiff, as such administratrix, asked judgment for \$5000 against the defendant, with costs.

To this complaint the defendant demurred, because it appeared upon the face thereof, *Firstly*. That the court had no jurisdiction of the subject of the action. *Secondly*. That the complaint did not state facts sufficient to constitute a cause of action against the defendant. And the defendant stated, as the grounds of objection to the complaint, and of their demurrer, as follows: That it appears upon the face of the

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complaint, that the death of the said Bartholomew Crowley was caused by the wrongful act, neglect or default of the defendants, on the Isthmus of Panama, in the Republic of New Grenada, and out of the state and jurisdiction of New York; and that no statute or law is in force in the state of New York which gives to the plaintiff, against the defendants, any right of action, by reason of any thing alleged in said complaint.

The court at special term overruled the demurrer, and ordered judgment for the plaintiff; and the defendant appealed.

*D. B. Eaton*, for the appellant. There is no allegation in the complaint as to the law relative to common carriers, in force in New Grenada; and it is therefore evident that the defendant cannot be held liable in the action under any other law than that in force in New York.

I. Prior to the New York statutes of 1847 (*Laws of 1847, p. 575, ch. 450*), and 1849, (*Laws of 1849, p. 388, ch. 256*), giving an action to the next of kin &c. of persons killed by negligence, under certain circumstances stated in those acts, the next of kin or personal representatives had not any right of action against those who should, by negligence, cause the death of a human being. No such right of action is recognized by the common law or by the laws of New York. *Actio personalis moritur cum persona, &c.* (*Broom's Leg. Max. 558. Chitty's Pl. 68, 69. Statute 9 and 10 Vict., ch. 93, p. 531. Cory &c. v. The Berkshire R. R. Co., 1 Cush. Rep. 475. Pack v. The Mayor &c., 3 Comst. 493, disapproving 20 Wend. 210. Huggins v. Butcher, 1 Brownlow, 205. Safford v. Drew, 12 N. Y. Leg. Observ. May, 1854, p. 150. Worley v. Cincinnati, Hamilton and Dayton R. R. Co., 1 Handy's Ohio Rep. 481. Campbell v. Rogers, 2 id.*)

II. The complaint is founded solely and specifically on the New York statutes, and damage is claimed under those statutes. It is therefore necessarily claimed by the plaintiff that an act of the legislature of New York, creating a new right

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of action, and giving damages for causes that before the statute were without responsibility for damages, extends to every part of the world, and binds citizens of New York wherever they may, through negligence, cause the death of a human being. If such be the rule of law, then every other act of the legislature of New York relating to negligence, and one man's responsibility to another for any careless conduct, will also apply and be of binding obligation in every other part of the world. And, as a further consequence, it must follow that every similar act of the legislative bodies of all other countries will, at least as to those resident therein, apply and be of full force in the state of New York. The conflict and confusion of rights and duties that such a rule of law would give rise to are apparent.

The appellants claim that it is the well settled law that statutes like those in question, regulating personal conduct and responsibility, are exclusively interterritorial in their application, and that no action can be maintained upon them, unless the act complained of took place within the state which enacted them. They have no more extra territorial effect than the license law, or the general rail road law, or the laws relating to canals and roads. Will it be pretended that a rail road built and operated by citizens of New York, in Michigan or Oregon or Russia, must be constructed and operated according to the provisions of the general rail road act of 1850? (*Laws*, p. 211.) Would sections 27 and 30, 37 and 38 of that act so apply? Would the New York court enforce sections 39, 41, 42, 43 and 44, where the road was situated in a foreign state? Can the courts of New York punish the persons guilty of the negligent acts complained of in this suit, under the 2d section of the act of 1849? (*See Laws of 1849*, ch. 256, p. 389.) It is admitted that certain trespasses and offenses are transitory, but they are only such as are a violation of absolute rights, recognized and protected by the common law, and which exist and were protected prior to any statute. Our courts, therefore, in absence of any proof to the

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contrary, may presume those rights to exist and to be protected by law every where, until the contrary is proved. But when a right arises from a statute, in New York, the theory of the presumption referred to would require the courts to presume that such right did not exist elsewhere, unless a statute is proved there.

It is admitted that acts relating to the *status* of a person in one state will be regarded as of force in another; as whether he be a husband or wife executor, guardian, &c. It is also admitted that a contract valid in the state where made, is, as a general rule, held valid every where. But these are very different cases from the one under discussion; and the cases last put arise upon common law rules and rights. The case under discussion involves the question whether a new rule of liability as to *torts*, enacted in and for New York, extends to New Yorkers every where, and places them, in all the regions of the globe, under liabilities, as to whatever business they undertake, which do not attach to people of other states, nor arise under the general principle of the common or public law.

If it be said that the defendant is a New York corporation, and subject to New York laws, we say it is to be treated as any citizen of New York would be treated, if he, residing in this state, owned a rail road in New Grenada or Russia. The fact that the defendant is a corporation, makes no difference as to the construction of this statute. Any private individual might be substituted as defendant, or may purchase the defendant's road. It does not appear that the plaintiff was a citizen of New York at the time of taking passage or receiving the injury; and if it did, it cannot be maintained that New Yorkers can claim a different construction of this statute in a foreign country, from what may be claimed by a citizen of New Jersey, who was a passenger on the same train and injured at the same time.

It cannot be held that the fact (if conceded) that the contract of carriage was made in New York, must decide the construction of the statute; for (1.) The action is not *in fact*

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founded on contract at all. (2.) No action, under or upon the statute, can be founded on contract, for the statute is not one purporting to give a right or remedy under a contract, but gives damages for a *tort* only. The section already referred to, (*Laws of 1849, p. 389, § 2,*) makes the parties who are guilty of the negligence (*tort*) referred to, liable to be indicted. It is absurd, therefore, to regard the statute as relating to contracts. (3.) But even if it could be said that the statute was one giving a remedy for a violation of a contract, we say the contract would be one (on the plaintiff's theory) made in New York, *but to be executed* in a foreign country; and the rule is universal that a contract is to be construed in reference to the law of the *place where it is to be executed*. It cannot be, and is not pretended, that by the laws of New Grenada, there was any liability for damages for the acts complained of. The general principles here maintained are illustrated in a great variety of forms in the following text books and decisions: (*Polson's Law of Nations, 62 Eng. Law Lib., N. S., 23. Phill. on International Law, 67 Law Lib., N. S., 356. Story on Conf. of Laws, §§ 7, 8, 18, 20, 29, 31 and 539, 540, 621. Hoyt v. Thompson, 1 Seld. 320, 340. Scoville v. Canfield, 14 John. 338. Hunt v. The Town of Pownal, 9 Verm. Rep. 411, 417. Sedgwick on Stat. 69, 70. Bank of Augusta v. Earle, 13 Peters, 519. People v. Adams, 3 Denio, 190. S. C., 1 Comstock, 173. People v. Rathbun, 21 Wend. 509. Blanchard v. Russell, 15 Mass. Rep. 14. State v. Knight, 1 Taylor's T. R. 65. Inhab. of W. Cambridge v. Inhab. of Lexington, 1 Pick. 506. Pickering v. Fisk, 6 Verm. Rep. 102. Commonwealth v. Clary, 8 Mass. Rep. 72. 1 Eq. Cas. Abr. 288. Ferrett v. Bartlett, 21 Verm. Rep. 184, 189. Holman v. Johnson, 1 Cowp. 341. Vanderverter, ex'r, &c. v. New York and New Haven R. R. Co., 27 Barb. 244. Beach v. Bay State Co., Id. 248. Indiana v. Johns, 5 Ohio Rep. 217. The Antelope, 10 Wheaton, 66, 223. Champion v. Janitzen, 16 Ohio Rep. 91. Goodsell v. St. Louis, 16 id. 178. Campell &c. v. Rogers, 2 Han-*

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*dy's Rep. of the superior court of Cincinnati, 1855; also reported in vol. 9 Law Reporter, p. 329.)*

*B. A. Wilson*, for the respondent. I. The defendant in this action is an artificial person, created by an act of the legislature of the state of New York, passed April 7, 1849, and the contract for carrying the deceased was made and entered into at the city of New York. The court has therefore jurisdiction of the person of the defendant and of the subject matter of the action. The administratrix "must be at liberty to allege the same cause of action that the party injured (if not killed) could have alledged; the death certainly not changing the cause of action from contract to tort." (*Opinion of Gould J. in Doedt v. Wiswall*, 15 How. 128. See also *Beach v. Bay State Steamboat Co.*, 16 id. 1; 23 Penn. St. Rep. 528, 530, and cases cited.)

II. The contract was to carry the deceased across a small portion of a foreign country—an isthmus crossed by an American mail route—and by the ordinary route of travel between one portion of the United States and another. The fair presumption is that the deceased was a citizen of the United States, passing from one portion of his own country to another portion of the same; and no evidence appearing to the contrary, a citizen of New York, where the contract for passage was made. The *lex fori*, which is the *loci contractus*, must, under the circumstances, determine the liability of the defendant.

III. The Isthmus of Panama is, for transit and certain other purposes, quasi United States territory. The United States, by treaty, are authorized to transport troops, mails and stores across it, and to protect the same in transit. Passengers too, in crossing, are exempt from duties, custom-house examinations and passport regulations, and are under the protection of their own government. For purposes of this suit it might well be held to be United States territory; and the *lex loci contractus*, which deceased carried with him, entitles

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the plaintiff to the remedy allowed by the laws of New York, at least until he fell under some other jurisdiction.

*By the Court*, E. DARWIN SMITH, J. The defendant is a corporation, created by the laws of this state, and must be deemed a resident of this state. (13 *Peters*, 519 ; and 14 *id.* 129. 2 *Howard's U. S. Rep.* 499.) This court must, therefore, have jurisdiction of the person of the defendant, in the same manner, and to the same effect, as over natural persons resident within this state. But jurisdiction of the person of the defendants does not include jurisdiction of the subject matter of the action. And appearance waives nothing, for section 144 of the code expressly gives the right to demur to the jurisdiction of the court in respect to the subject matter of the action, as well as of the person. And this is the question particularly raised upon this demurrer. The cause of action in the complaint, so far as it depends upon the killing of the intestate, did not arise within this state, but arose on the rail road of the defendants, between Aspinwall and the city of Panama, in the Republic of New Grenada, where it is alleged the husband of the plaintiff was killed, by the negligence and unskillful conduct of the agents and servants of the defendants. Clearly, no action at common law would lie for the cause stated in this complaint, even if the death had occurred in this state. (*Quin v. Moore*, 15 *N. Y. Rep.* 436. 9 *Oranch*, 480. *Green v. Hudson River R. R. Co.*, 28 *Barb.* 13. 21 *id.* 245.) The right, therefore, to maintain this action, depends upon the question whether the acts of the legislature of this state, of 1847 and 1849, (*Sess. Laws of 1847*, p. 575 ; *Id. of 1849*, p. 388,) giving a right of action to the next of kin of persons killed by " the wrongful act, neglect or default of another," applies to the case. If the defendants were a foreign corporation the case would be precisely identical with the cases of *Vanderventer v. The New York and New Haven R. R. Co.*, (27 *Barb.* 244,) and *Beach v. The Bay State Company*, (*id.* 248,) in which Justices Peabody

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and Clerke, at special term, came to opposite conclusions. The general proposition is undoubted and indisputable, that the statutes of one state have no force, *ex proprio vigore*, beyond the territorial limits of the state. This is too obvious for discussion. But the courts in all civilized states do, more or less, take cognizance of causes of action arising in other states and countries, in respect to persons within their jurisdiction. This is universally done in all civilized countries, and especially where the common law prevails in respect to personal rights of action, so far as they are transitory. That the acts of 1847 and 1849 cannot affect foreign corporations, or citizens or residents of other states, and give rights of action against them enforceable in our courts, for acts done in other states and countries, is, I think, quite conclusively shown in the opinion of Justice Peabody, in the case of *Vanderwerker v. The New York and New Haven R. R. Co.*, (*supra*,) in which I fully concur. But the question remains, may not these acts apply, as between citizens of this state, where the neglect or wrongful act causing the death took place in another state or country. The question, in this aspect of it, is precisely the same as if one citizen of this state, by some neglect, or default, or wrongful act, killed another citizen, in a foreign state or country. Whatever civil right of action by the law of the place attached to, or was given by, or arose from the act of killing in such case, would doubtless be transitory and follow the person, and might be enforced in this state. But if the law of the place gave no civil right of action for such cause, none of course would exist any where else at the time; and if the party causing the death never returned to this state, he could not, obviously, in any way be amenable to its law, or be subject to any liability under or by virtue of the same. Would his return to this state, *ipso facto*, subject him to an action under our statute? I think not. In *Beach v. The Bay State Company*, (*supra*,) Judge Clerke says: "It cannot be doubted that any one state or nation has the right to give to its citizens redress for personal inju-

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ries committed *without* as well as *within* its territorial limits. This is undoubtedly so, within the scope of civil actions for the enforcement of all those rights of action which follow the person. But is it true beyond this limit? Can one of our state governments, by its legislation, follow the citizen out of its territory, so as to confer jurisdiction on our courts to take cognizance of his acts, and give redress to or against him, for extra-territorial wrongs?" The learned judge also says: "I can see no reason to infer that the legislature intended to confine the operation of these acts, (the acts of 1847 and 1849,) in their remedial features, to injuries committed within the territorial limits of this state." But, on the other hand, is there any ground to infer that the legislature intended to *extend* the operation of these acts beyond the limits of this state, or designed to apply them to persons residing in other states, artificial or natural, or citizens of this state residing temporarily abroad, so as to give a remedy against them, for injuries committed out of the state? If the state *can do so*, I can see no evidence of any intent on the part of the legislature to give these acts such an extra territorial force. The purpose of the legislature, in such cases, should be very explicitly declared, if such were the intent of an act. But if these acts follow the citizen out of the state, so as to give a right of action enforceable against any person or corporation of which the courts can get jurisdiction, for wrongs done out of the state, then the acts of any other state or legislature may, upon the same principle, operate throughout the union, or throughout the civilized world, as valid laws, so far as to give a right of action whenever jurisdiction of the person could be obtained. An act of the legislature of this state would thus practically become universal public law. I think this cannot be the intent or force of these acts. They are purely *local*, and limited to the sovereignty and domain of the state, and only apply when the subject matter of the action arose within this state.

But as the defendants are a corporation organized under a

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special charter of this state, and therein authorized to construct and maintain a rail road across the Isthmus of Panama, I have no doubt the legislature might expressly have subjected them, in the use of their said rail road, and in the exercise of their corporate franchises, to the operation of these acts, as part of the condition of their being. In looking into the charter I find, however, no provision on the subject.

The only question which remains to be considered is, how far the fact that the contract was made, and the fare paid, in this state, for the transportation of the plaintiff's intestate upon the defendants' road, affects the right of action here, notwithstanding the killing was in New Grenada. The complaint states "that on or about the 24th day of April, 1856, at the city of New York, for a reasonable compensation paid to the defendants by the said Bartholomew Crowley, (the plaintiff's intestate,) the defendants agreed to convey the said Bartholomew over their said rail road from Aspinwall to Panama, when he, the said Bartholomew, should thereafter arrive at Aspinwall; and that the defendants received him on their said road on his arrival there, and that the servants and agents of the defendants so negligently and unskillfully conducted themselves, in the management of the said rail road, that through such negligence the said Bartholomew was killed, while a passenger in one of their cars." Here was an express agreement made in this state safely to transport the plaintiff's intestate over the defendants' rail road as a passenger, which, if Crowley, from the negligence of the defendants' agents or servants, had sustained any injury on the said rail road, that he had survived, would unquestionably have entitled him to maintain his action therefor, in this state. If the cause of action set out in this complaint, therefore, could be considered as arising upon this contract, and surviving by force of the statute, in behalf of the plaintiff as the representative of the deceased, then most certainly the action could be maintained in this state. But such is not this action. It is not upon the contract. It is founded upon a *tort*. No right of action

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for injuries to the person of Crowley can survive ; for "*actio personalis moritur cum persona*." The cause of action under the acts of 1847 and 1849 is a new and original one, given by and depending wholly upon the statute. Such was the view of these statutes taken by Judge Hogeboom in the case of *Yertore, adm'r, &c. v. Wiswall*, (16 Howard, 8,) which, being a general term decision, is authority upon this point. And the same view was taken by the court of queen's bench, of the English statute of 9 and 10 Victoria, 93, from which statute, I presume, ours was copied, in *Blake v. Midland Railway Co.*, (10 Eng. Law and Equity, 442 ;) and by Judge Hoffman in *Safford v. Drew*, (3 Duer, 638.)

I think, therefore, that this court has no jurisdiction of the cause of action set out in the plaintiff's complaint, and that the judgment of the special term should be reversed, and judgment given for the defendant, upon the demurrer.

Judgment reversed.

[MONROE GENERAL TERM, September 5, 1859. T. R. Strong, Johnson, Welles and Smith, Justices.]

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 TRACY vs. SUYDAM and others.

A commission to take testimony is a writ or process issued by the special order of the court, and a seal is essential to its validity. If it be issued without a seal it confers no authority upon the commissioners, and depositions taken under it are extra-judicial and cannot be received in evidence.

After the death of one of several partners, no action will lie against his personal representatives, for the recovery of a partnership debt, while the surviving partner is alive ; until the inability of the latter to pay the debt has been legally ascertained, or clearly shown.

Where a claim is presented to executors, against the estate of their testator, the justice of which is disputed, and the parties agree to refer the same, under the statute, the agreement to refer need not notice matters of defense to the claim.

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On the approval by the surrogate of the agreement to refer, and filing the same in the office of a clerk of the supreme court, the agreement becomes operative as a voluntary appearance by the parties, in this court, and a submission to its jurisdiction, for the purpose of adjudicating upon the claim presented.

The account presented is, in effect, the plaintiff's complaint, and there being no pleadings, and no provision in the statute for pleadings, the defendant is limited to no particular defense; and consequently any and every legal defense against the claim must necessarily be available. *Per SMITH, J.*

On the trial before the referees, the plaintiff must prove his claim, and satisfy the referees of its justice and validity; and every species of legal proof adapted to show the injustice of the claim, or its invalidity as a whole, or in degree or amount, is admissible.

Within this rule, a set-off may be proved; or a payment in whole or in part; or proof given to reduce the amount.

And the executors are at liberty to make any defense that their testator could himself make, if alive, and the same were properly pleaded, in an action upon such claim.

They may, therefore, insist upon the statute of limitations; and if that defense is sustained, it is a complete answer to the whole cause of action.

**A** PPEAL from a judgment entered upon the report of referees. This was a reference under sections 39 and 40 of article 2, title 3, chapter 6, of part 2 of the revised statutes, of a disputed claim, against the estate of Carlton Legg, deceased, to three referees. The appellants are the executors of Legg; and the respondent, claiming to be a creditor of said estate, presented an account to the appellants, as such executors, claiming a balance due him of \$1058.85, verified by his affidavit, on the 15th day of March, 1855. The executors doubting the justness of the said claim, entered into an agreement with the respondent to refer the same pursuant to the statute. That agreement was as follows:

"Whereas Morgan D. Tracy has lately presented a claim against the estate of Carlton Legg, deceased, to Nicholas D. Suydam and Moses A. Legg, the executors thereof, for moneys due him for his share of wood and timber sold and secured from a farm jointly owned by said Carlton Legg and Morgan D. Tracy, and moneys paid, and for his services in superintending the said farm and getting off said timber and wood,

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and selling the same, and for expenses incurred and paid on the joint account, and for other demands against the said estate as former partner or joint owner with said Legg, of a certain farm, and other demands against the said estate, and for interest on the same. And whereas the said executors doubt the justice of the said claim, alleging that the said claims are not just and valid against said estate ; it is therefore agreed, in conformity with the statute in such case made and provided, by and between the said Nicholas D. Suydam and Moses A. Legg, executors of, &c. of said Carlton Legg, deceased, and Morgan D. Tracy, that the said matter in controversy and all claims and demands which he has against said estate, be referred, pursuant to statute, to Samuel S. Ellsworth, Daniel W. Streeter and Theodore F. Sharpe, all of Penn Yan, Yates county, three disinterested persons, as referees to hear and determine the same with all convenient speed. Sept 1, 1855."

The agreement was signed by the parties, and the surrogate of Yates county indorsed upon it his approval of the persons named therein as referees ; and it was filed in the office of the clerk of that county. An order was thereupon made by this court, referring the matter to Samuel S. Ellsworth, Daniel W. Streeter and Theodore F. Sharpe. Theodore F. Sharpe having removed from the county and refused to act, Benjamin L. Hoyt was substituted as referee in his place. The matter was brought to a hearing before the said referees, at Penn Yan, on the 9th day of August, 1858, when the following facts appeared. In the month of May, 1839, Carlton Legg and Stephen Rice owned a farm of about 145 acres, in Pultney, Steuben county, which had been conveyed to them by one Voorhies. On the 4th of May, 1839, Rice conveyed his share of the farm to Morgan D. Tracy, the respondent, and Seymour Tracy. By an arrangement between Legg and the two Tracys, Morgan D. Tracy, the respondent, was to go on and take the supervision of the land ; attend to getting out wood, timber, &c., and the farm was to allow him \$300 a year for his services ; i. e. Legg was to pay one half, Seymour Tracy

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one quarter, and Morgan D. Tracy one quarter. On the 14th day of March, 1842, C. Legg, S. Tracy and M. D. Tracy conveyed the farm in question to Thomas Caly, who entered into possession of the same and remained so in possession until the spring of 1844. Caly executed to Legg and the Tracys a mortgage on the said farm for a part of the purchase money, bearing date the same day with the deed to him. That mortgage was subsequently foreclosed in chancery, and the premises were sold by a master in chancery, and bought in by C. Legg and M. D. Tracy, and conveyed to them May 1, 1844. Seymour Tracy sold his interest in the land to M. D. Tracy at the time of the foreclosure, in May, 1844. After the sale of the farm under the foreclosure and the purchase by Legg and M. D. Tracy, they owned the farm equally for about three years, when they sold most of it. From the time of the sale to Caly, Seymour Tracy had no farther interest in the land. The balance of the farm was sold by Legg and M. D. Tracy in March, 1849.

On the hearing before the referees, the counsel for the defendants claimed and insisted, 1st. That the plaintiff could not recover any thing for matters growing out of the ownership, occupancy, working or sale of the farm in question, by the plaintiff, C. Legg, the testator, and Seymour Tracy, previous to the sale to Caly in 1842, because they were tenants in common of the farm, and one could not recover of the other, until there had been a full accounting, which cannot be had in this proceeding for want of proper parties. That Seymour Tracy should be a party, as he was equally interested with the plaintiff. 2d. That so much of the plaintiff's claim as grew out of and arose during the joint ownership of the farm by Legg and the Tracys, constituted an independent account between the parties to this suit and Seymour Tracy. That no part of such account accrued to the plaintiff within ten years before the institution of these proceedings, and that the plaintiff could not recover, and that the same was barred by the statute of limitations. 3d. That the plain-

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tiff could not recover any thing growing out of the ownership of the farm by him and Legg, after the purchase under the mortgage in 1844, until there had been a full accounting between them, as they were joint owners of the farm and in partnership as to the proceeds. And furthermore, that the account was barred by the statute of limitations, as to the whole of the account, except the last charge of wood from 1847 to 1851. 4th. That the plaintiff was not entitled to recover any thing for superintending the farm after he and Legg bought it under the mortgage, because the agreement to pay the \$300 a year was between Legg and the two Tracys, and when they sold the farm it terminated, and the repurchase by Legg and the plaintiff did not revive it, and there was no new agreement between them, nor any proof as to the value of the services; and had there been any proof of the value of the services, the plaintiff could not recover without an express promise to pay. Which several positions and points were controverted by the plaintiff's counsel, who amongst other things claimed and insisted that the defendants not having set up the statute of limitations as a defense, at the time the agreement of reference was made and issue joined, could not now avail themselves of such defense on the trial; and that the defendants were not entitled to any set-off against the plaintiff's claim, because, 1st. They set up no such claim in the agreement of reference or in joining issue; and 2d. They had not proved any on the trial.

The referees subsequently made their report in favor of the plaintiff, and the defendants filed and served exceptions to said report, and appealed from the judgment entered thereon.

*S. H. Welles*, for the appellant.

*C. H. Judd*, for the respondent.

*By the Court*, E. DARWIN SMITH, J. The referees, it seems to me, erred in several particulars on the trial and decision of this cause. In the first place, the commission, and

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the depositions annexed, were improperly received in evidence. The paper purporting to be a commission, being without seal, conferred no authority upon the commissioners, and the depositions annexed were extra-judicial. (5 *Iredell*, 96. 4 *Dev.* 95. 3 *id.* 279.) A commission is a *writ* or *process* issued by the special order of the court, and a seal is essential to its validity. (19 *John.* 212. 6 *Ham. Ohio Rep.* 11.) The judiciary act of 1847 only dispensed with the seal in respect to process which issues *of course* without any application to the court.

But upon the merits, other errors, more important, occur. In the first place, it appears that on the 4th day of May, 1839, the plaintiff and Seymour Tracy became the owners, with the defendant's testator, of an undivided half of the lot of land referred to in the case, under an agreement, as the referees find, that the plaintiff should receive \$300 a year for taking the charge and oversight thereof. This agreement was made, necessarily, with his tenants in common, and as a personal claim was a claim against both of them, and survived against Seymour Tracy on the death of the testator, Legg; and no action at law, or suit in equity, would lie against the defendants singly therefor, Seymour Tracy being still living, until his inability to pay the same had been legally ascertained or clearly shown. (2 *Denio*, 585. *Voorhis v. Childs' Ex'r*, 17 *New York Rep.* 357.) But the agreement, as found by the referees, made between Legg and the two Tracys, in May, 1839, for the payment of \$300 to the plaintiff for his care and oversight of the farm, clearly terminated with the sale of the farm on the 14th March, 1842. On the repurchase of the farm by Legg and the plaintiff in May, 1844, the agreement for the salary did not, *ipso facto*, revive. And there is no proof of any new agreement between Legg and the plaintiff for its revival or continuance. The referees, therefore, clearly erred in allowing the plaintiff a salary of \$300 for six years, against the defendant, as for his services in respect to the farm, upon the basis of the original agreement for such

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compensation. The referees also erred in overruling the proof that the plaintiff had received payment for the pasturing in 1846 of the 100 sheep on the farm then owned by him and Legg, and for the wheat sold therefrom. Upon the assumption that the plaintiff was entitled to recover of the defendant for his services in taking care of the farm, and to have an accounting with them in respect to his disbursements for and receipts therefrom, he was clearly bound to account for the money received for the pasturing of the sheep and for the wheat sold. The money, so far, paid him for his services in taking care of the farm, and was a proper offset to his claim, or was admissible in proof to reduce the same by way of payment. It was objected to this evidence, that the claim therefor was not contained in the agreement to refer. This is true. But I do not understand that matters of defense are ever, or need be, in these cases, set up in the agreement to refer. The whole proceeding is *sui generis*. The agreement to refer relates to a particular claim presented to the executors or administrators, the justice of which is disputed. (2 *R. S.* p. 88, § 36. *Dayton's Surrogate*, 354.) The agreement to refer recites this fact, and on the approval thereof by the surrogate and filing of the same in the office of a clerk of this court, becomes operative as a voluntary appearance by the parties thereto in this court and a submission to its jurisdiction, for the purpose of adjudicating upon the claim presented. The account presented is in effect the plaintiff's complaint; and there being no pleadings and no provision in the statute for pleadings, the defendant is limited to no particular defense, and consequently any and every legal defense against the claim must necessarily be available. (7 *Wend.* 522. 13 *id.* 453.)

On the trial before the referees, the plaintiff must prove his claim and satisfy the referees of its justice and validity, and every species of legal proof adapted to show the injustice of the claim, or its invalidity as a whole, or in degree or amount, must be admissible. Within this rule a set off may

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be proved, or a payment in whole or in part, or proof given to reduce the amount. And the defendants standing upon their denial in the agreement to refer, of the justice of the claim, must be at liberty to make any defense that their testator or intestate could himself make if alive, and the same were properly pleaded in an action upon such claim. Within this rule the defendants were entitled to insist on the statute of limitations. The statute of limitations is a very proper and meritorious defense in cases like this, where claims of a doubtful character are suffered to lie along till witnesses and parties are dead, and executors or other persons entirely ignorant in regard to them are called upon to make payment.

It was the obvious right and duty of the executors to interpose this objection to the plaintiff's recovery, and I cannot see why it was overruled by the referee, or why it was not a complete defense to the whole cause of action.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

Judgment reversed and new trial granted.

[MONROE GENERAL TERM, September 5, 1859. *T. R. Strong, Johnson, Welles and Smith*, Justices.]

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 NORRIS vs. DENTON and others.
 

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A statement upon which a judgment is entered by confession, which alleges the consideration for the judgment to be a promissory note given by the debtors, to the plaintiff, for value received, but without specifying the amount or consideration of the note, is defective; and it has been held in repeated cases that such a judgment may be set aside on motion, at the instance of other judgment creditors.

And the right to set aside, or attack, a void judgment thus entered up by confession, upon a defective statement, is not limited to judgment creditors. A judgment confessed without full compliance with the provisions of the code, is to be deemed fraudulent and void, as against the creditors of the judgment debtor; and it may be attacked by a grantee or mortgagee of premises upon which such judgment is a lien, as well as by judgment creditors. JOHNSON, J., dissented.

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They may do this, either by bringing an action for that purpose, or in defense of an action brought to enforce such judgment, to which they are made parties.

**A**PPEAL from a judgment entered at a special term, upon the report of a referee. The action was brought to recover \$312.44, the surplus moneys arising from a sale of premises under a mortgage executed by the defendant Wood, which amount was in the hands of the defendant Welles, and was claimed by the plaintiff as a judgment creditor of the defendant Wood. On the 1st of February, 1852, Henry Wood, one of the defendants, executed and delivered to Charles C. Sheppard, a mortgage on certain real estate owned by Wood in Penn Yan, to secure the payment of a certain debt, which mortgage was subsequently assigned to Isaac Hartshorn. On the 3d day of January, 1853, the defendant Wood, with John H. Bruen, his partner, confessed a judgment in favor of the plaintiff Norris for \$300, and judgment was on that day duly docketed with the clerk of Yates county for \$305 damages and costs. That judgment was entered upon the following statement of the consideration thereof, signed by Wood & Bruen: "We, Henry Wood and John H. Bruen, defendants, hereby severally confess ourselves indebted to James H. Norris, plaintiff, in the sum of three hundred dollars, with interest thereon from this date, and hereby authorize him, his executors, administrators, attorney or assigns, to enter a judgment against us for that amount. The above indebtedness arises on a promissory note given by us for value received, to the said plaintiff, and to which note this judgment is given as a collateral security; and we hereby state that the sum above by us confessed is justly owing to the said plaintiff by us, and will be due according to the condition of the said note, without any fraud whatever; and this judgment is given upon the express condition that no execution shall issue thereon till the first installment, payable on said note, becomes due and remains unpaid. Dated January 3, 1853." On the 23d day of November, 1854, the defendant Wood executed

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and delivered to the defendants Lewis and Sylvester Denton, a mortgage to secure them against contingent liabilities incurred, and to be thereafter incurred. On the 19th day of January, 1856, the Sheppard mortgage was foreclosed, and the premises were sold; and after paying the amount of the mortgage and costs of foreclosure, a surplus of \$312.44 was left in the hands of the defendant Welles, which was claimed by the plaintiff Norris, and also by the defendants Dentons. The action was brought against Lewis and Sylvester Denton, and Wood and Welles. Wood and the Dentons appeared and defended. Welles suffered a default. The cause was referred to a referee, who reported that the plaintiff was entitled to the surplus moneys. A motion was made at the Ontario special term on the 27th of August, 1857, for the appropriate judgment against Welles, upon his default, which motion was granted, and judgment was entered against Welles that he pay over said money to the plaintiff, but without costs. There was no judgment against Lewis and Sylvester Denton, yet they alone appealed.

*C. G. Judd*, for the appellants. I. The referee erred in overruling the objection by the appellants to the proof of the plaintiff's judgment. (1.) It was entered by confession without action, and without any such statement in writing as is required by § 383 of the code. The indebtedness was for money due, or to become due, and there was no statement of the facts out of which it arose; nor did it appear that the sum confessed did not exceed the amount due, or to become due. (*Johnston v. Fellerman*, 13 *Howard*, 21, 145. *Chappel v. Chappel*, 2 *Kernan*, 215. 11 *How.* 505. 12 *id.* 141, 410. 10 *id.* 494. 13 *id.* 142. *Dunham v. Waterman*, 17 *N. Y. Rep.* 9.) (2.) The judgment was not merely irregular, but was absolutely void as against these appellants, having a specific lien on the mortgaged premises sold and the surplus moneys in the hands of the defendant Welles. (4 *Paige*, 503. 11 *How.* 503, 506. 13 *id.* 142, 144, 145. 2 *Kernan*, 215, 222. 1

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*Hill*, 144. 5 *Cowen*, 547. 7 *Abb. Rep.* 23. 1 *Denio*, 190, 198. 4 *Smith*, 496.)

II. The referee erred in finding that the plaintiff's judgment was a valid lien on the surplus moneys in question, prior to that of the appellant's mortgage. (*See authorities above referred to.*)

III. The referee erred in finding that the appellants were not entitled to the surplus money. (*See the points and authorities above; also Tallman v. Farley*, 1 *Barb.* 280.)

*D. J. Sunderlin*, for the respondent. I. The judgment of the plaintiff against Wood & Bruen for \$305, on the 3d of January, 1853, was a valid judgment, and bound the real estate of the defendants until satisfied or set aside. It is a judgment in the supreme court, and until paid or set aside, the lien created by such judgment on the premises of Wood continues on the surplus in the hands of the defendant Welles. It matters not that the statement is defective in some particulars; that does not render it void. It may be a ground for setting aside the judgment on motion by a judgment creditor, but by no other. Sylvester and Lewis Denton are not judgment creditors. They are merely mortgagees, holding the mortgage as collateral security for a contingent liability, and liable to have their mortgage attacked on the ground of fraud.

II. None but judgment creditors can attack the plaintiff's judgment. As long as it is permitted to stand, so long its lien continues on the surplus money. The defendants must first seek to set aside the judgment by an appropriate proceeding; they cannot attack it in this collateral way. The remedy is by motion. (*Chappel v. Chappel*, 2 *Kernan*, 222. 2 *Whitaker's Pr.* 77. *Burkhardt v. Sanford*, 7 *Howard's Pr. Rep.* 329, 333.)

III. If the statement upon which judgment was confessed was not full, or was defective in some particulars, then it was an irregularity, only in the entry of judgment. (*Whitney v.*

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*Kenyon*, 7 *How. Pr. B.* 458.) And such irregularity can only be taken advantage of by motion within one year after the entry of judgment. (*Whitaker's Pr.* 77. 5 *Howard's Pr. B.* 381. 8 *id.* 312. 9 *id.* 35. *Code*, § 174. 2 *R. S.* 282, § 2.)

IV. The defendants, by their answer, do not ask for affirmative relief. They do not ask to have the plaintiff's judgment set aside. The question whether the plaintiff's judgment shall, or shall not be set aside, or adjudged void, is not before the court. The court cannot upon this appeal disturb the judgment; it must remain a judgment of record, and being good as against Wood & Bruen, and creating a lien on their real estate, their subsequent mortgagees can acquire no greater right than Wood & Bruen had. And the Dentons, having taken their mortgage nearly two years after the entry of the judgment, took it subject to the incumbrance existing at the time.

V. The indebtedness for which the plaintiff's judgment was confessed, is nowhere denied in the defendants' answer. The intention to give the plaintiff a lien by the judgment is clearly manifest nearly two years before the execution of the mortgage. The equities are, therefore, most strongly in favor of the plaintiff, and the court possess as much power to amend the judgment on this appeal, as they would to set aside or vacate it, or to reform a mortgage and apply the surplus money arising from a previous sale.

E. DARWIN SMITH, J. The first error complained of in the decision of the referee on the trial of this action was committed, as is claimed, in overruling the objection of the appellants to the proof of the plaintiff's judgment. This judgment was entered upon a confession, pursuant to sections 382 and 383 of the code.

The statement signed by the defendant showing the consideration for the judgment was clearly defective, according to the decisions in the case of *Chappel v. Chappel*, (2

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*Kernan*, 211,) and in 12 *Howard*, 141 and 410, and numerous other cases in this court. The counsel for the defendants Denton claims that the judgment for this reason is absolutely void as against the appellants, they having a specific lien upon the surplus moneys in the hands of the defendant Welles. The judgment is doubtless valid and amendable between the parties, reserving the rights of existing creditors. It has been held in repeated cases, that such a judgment may be set aside on motion, at the instance of other judgment creditors. The plaintiff's counsel contends that none but judgment creditors can attack the judgment, and that while it is permitted to stand it is a valid and conclusive lien upon the surplus moneys which are the subject of contest in this action. I can see no reason why the right to set aside or attack a void judgment like this, entered up by confession upon a defective statement, should be limited to judgment creditors. It is held in *Chappel v. Chappel*, and in other cases, that the object and policy of the statute is the same as that of the act of 1818, regulating confessions of judgment. In that act it was expressly declared, that such judgments should be deemed and adjudged *fraudulent* in respect to bona fide judgment creditors, and bona fide purchasers for a valuable consideration, of any land bound or affected by such judgment. In the recent case of *Dunham v. Waterman*, in the court of appeals, (17 *New York Rep.* 9,) Judge Selden says of the present statute, that considering the object in view, it is plain that its meaning is the same as that of the act of 1818. It must therefore be considered as settled by the highest court in the state, that a judgment confessed without full compliance with the provisions of the code, is to be deemed *fraudulent and void* as against the creditors of the judgment debtor. In a note at the end of this case, by the reporter, it is stated that all the judges agreed that the judgment was *void*. *Strong* and *Roosevelt* deemed it valid as to the parties, though fraudulent as to creditors. The defect is one of *substance* and not of mere *form*, and affects sub-

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stantial rights. If it were a mere question of regularity, then this court would have exclusive control over the judgment, and could amend it in its discretion, as against any creditors, and the judgment could not be attacked except in this court, and by a motion directly to set it aside. But the defectiveness of the statement being regarded as matter of *substance* is conclusive evidence, upon the face of the record, as against any creditors whose rights are affected by such judgment. A grantee or mortgagee of premises upon which such judgment is a lien, must have the same right to attack it as a judgment creditor. Judgment creditors may move to set it aside, or commence a suit for that purpose in equity. The case of *Chappel v. Chappel*, as Judge Selden says in *Dunham v. Waterman*, merely affirmed the power of this court to set aside such judgment upon *motion*. "That the same end might be attained by an original suit," he says, "is clear." (17 *N. Y. Rep.* 15.) But if grantees and mortgagees cannot move to set aside such judgment because they have no place in court, which I do not think to be the law, though so held in some cases, they certainly can commence a suit for that purpose, and may also, with equal reason, propriety and right, attack and resist in defense of any action to which they are parties, any such judgment where the same is sought to be enforced by suit upon the judgment, by the plaintiff. Such is the present case. The appellants set up their defense to this judgment in their answer, and allege that it is fraudulent and wholly void as against the creditors of Horace Wood, and as against them, the appellants, as such creditors, by reason of the very defects in the statement apparent on the face of the record, and that such confession was not made in manner and form according to the requirements of the statute. It is a mistake to consider this an attack upon the judgment *collaterally*. It is as direct an attack upon the judgment under the present system of pleading and proceeding as if the defendants had commenced the suit, setting up the same matter and asking to set aside the

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judgment; and the judgment roll, when produced, disclosed these defects, and was duly objected to by the appellants, and such objection overruled. The decision of the referee upon this question was clearly erroneous. The judgment was absolutely void as against the defendants, the Dentons, for fraud, upon the face of the record, and their defense to the plaintiff's action was completely established by the judgment record itself. The plaintiff having no valid judgment, the appellants were clearly entitled to a judgment declaring their right to receive the surplus money in the hands of the defendant Welles. As the decision of the exception disposes of the whole action, it is unnecessary to consider the other question presented in the case. There should be a new trial, with costs to abide the event.

T. R. STRONG, J., concurred.

JOHNSON, J., dissented.

New trial granted.

[MONROE GENERAL TERM, September 5, 1859. *T. R. Strong, Smith and Johnson*, Justices.]

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WILSON, executor, &c. and others, vs. LYNT and others.

A testatrix, by her will made in 1845, directed that upon the death of her mother, the value of her lot fronting on C. street in the village of H. should be estimated as land only, irrespective of any improvements which should be made thereon, and that the amount so estimated should be paid by her executors out of the produce of her real or personal estate, to the trustees of the Baptist church in Oliver street, in the city of N. Y., to be by them put out at interest until, with the additions which should be made by subscriptions or otherwise, a sufficient sum should accumulate to enable the trustees of that church to erect in the said village of H. a church or place of worship for christians of the Baptist denomination. The will contained a general power to the executors, as trustees, to sell and dispose of all the real and personal estate of the testatrix, and directed them to divide the proceeds, after the pay-

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ment of her debts and the performance of the trusts mentioned in the will, to her brothers and sister, and the children of a deceased brother. After the making of the will, the testatrix sold the lot on C. street for \$250. The value of the lot subsequently increased, so that at the death of her mother, in 1866, it amounted to from \$1000 to \$1500, irrespective of any improvements made after the date of the will. The acting executor had in his hands about \$700, being what remained of the personal estate of the testatrix, after payment of debts, &c. and all her bequests, except those to the Baptist church and the residuary legatees. He had sold the real estate to the defendant L. for \$2800, who was willing to take a conveyance and pay the purchase money, if the court should determine that the executor had power to sell and convey the land, so as to give a good title. After the date of the will, and during the lifetime of the testatrix, a church was erected by the Baptists in H., sufficient to accommodate all of that denomination residing in that vicinity, to which the testatrix contributed \$50.

*Held*, 1. That under the provisions of the revised statutes relative to accumulations (1 R. S. 778, 774, § 8) and the decision of the court of appeals in *Williams v. Williams*, (4 Selden, 525,) making those provisions applicable to bequests to religious societies, the direction for an accumulation for the erection of a church at H. was inoperative and void.

2. That donations to incorporated religious societies are exempt from the provisions of the revised statutes to prevent perpetuities.

3. That the legacy to the Baptist church in Oliver street could not be sustained, either as a contribution towards building another church, or to defray the expenses of the edifice which was erected during the lifetime of the testatrix; inasmuch as the bequest could not be effectuated without violating the provisions of the revised statutes against accumulations, and because the proposed object had been accomplished through other means, in the lifetime of the testatrix.

4. That although the legacy to the Baptist church was void, the power given to the executors to sell the real estate of the testatrix was valid; and that L. must complete his purchase.

*It seems* that the trustees of an incorporated religious society have not the capacity to take property devised or bequeathed to them in trust for other societies.

THIS action was brought by Clement A. Wilson, executor &c. of Hannah Godfrey, deceased, and by several other persons, her heirs at law, and the devisees and legatees named in her will, against Peter B. Lynt, and the Baptist church in Oliver street in the city of New York. Its object was to obtain a construction of the will of the testatrix, some of the provisions of which were supposed to be of doubtful validity.

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The defendant Lynt had become a purchaser of certain real estate, from the executor, and was willing to complete his purchase, if the court should decide that the executor could convey a good title, but not otherwise.

*H. S. Mackay*, for the plaintiffs.

*R. S. Rowley*, for the defendants.

S. B. STRONG, J. The testatrix, by her will, directed that upon the death of her mother the value of her lot fronting on Constant street, in the village of Hastings, (in the county of Westchester,) should be estimated as land only, irrespective of any improvements which should be made thereon, and that the amount so estimated should be paid by her executors out of the proceeds of her real or personal estate, to the trustees of the Baptist church in Oliver street, in the city of New York, to be by them put out at interest until, with the additions which should be made by subscriptions or otherwise, a sufficient sum should accumulate to enable the trustees of that church to erect, in the said village of Hastings, a church or place of worship for christians of the Baptist denomination. The will contains a general power to the executors as trustees, to sell and dispose of all the real and personal estate of the testatrix, and directs them to divide the proceeds, after the payment of her debts and the performance of the trusts mentioned in the will, to her brothers and sister, and the children of a deceased brother. The will was made in 1845. The testatrix afterwards sold the lot on Constant street for \$250. The value of the lot subsequently increased, so that at the death of her mother, in 1856, it amounted to from \$1000 to \$1500, irrespective of any improvements made subsequently to the date of the will. The acting executor has now in his hands about \$700, being what remained of the personal estate of the testatrix, after payment of her debts and funeral expenses, and all her bequests except those to the Baptist church

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and the residuary legatees. He has recently sold the real estate to the defendant Lynt, for \$2600, who is willing to take a conveyance and pay the purchase money, provided this court shall decide that the executor can make a good title, but (as he is advised that the power to sell and convey the land is doubtful) not without, and until, such determination. After the date of the will, and during the lifetime of the testatrix, a church was erected by the Baptists, in Hastings, sufficient to accommodate all of that denomination residing in that part of the county, to which she contributed the sum of fifty dollars. The plaintiffs now ask for a determination of this court, giving a legal construction of the will, and passing upon the validity of its doubtful provisions, in order that the executor may safely execute the powers conferred upon him, the purchaser be quieted in his title or protected in refusing to take any, and the beneficiaries under the will receive the portions to which they are entitled.

The principal question involved in this action relates to the bequest to the Baptist church in New York, for the erection of a church edifice for worshippers of the same denomination in Hastings. It has been contended, for various reasons, that it cannot be maintained. The counsel for the plaintiffs suppose that if it had, originally, sufficient elements of vitality, it failed upon and by reason of the sale of the lot on Constant street, by the testatrix, after she had executed her will. That would have been the effect if the devise had been of that lot or its proceeds. But it was not of either. The will directed that the lot should be estimated, and that the amount at which it should be estimated should be paid to the trustees of the church out of the produce of her real or personal estate. The lot was designated simply to ascertain and fix the extent of the gift. Possibly the testatrix may have supposed that her residuary donees would have an equivalent, in the lot, to what would be deducted from their respective portions; but a devise or bequest does not fail, simply because the moving consideration may have ceased to exist, or to be available.

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The fact that the will was not subsequently revoked or altered would be indicative of a continuance of the intent, whatever may have been the original motive.

There is no positive direction to erect a church at Hastings; but as the trustees of the church in New York are required to put out at interest the principal fund bequeathed to them until, with the additions from subscriptions or otherwise, a sufficient sum should accumulate to enable them to erect the church at Hastings, a direction to that effect is clearly and sufficiently implied.

The proposed accumulation is not exclusively, if at all, for the benefit of minors; nor is it to terminate at the expiration of the minority of any one. It is not therefore such an one as is allowed by the revised statutes. (1 R. S. 773, 4, § 3.) Those statutes provide (§ 4) that all directions for the accumulation of the interest, income or profits of personal property, other than such as are therein allowed, shall be void. As the court of appeals has permitted that provision to apply to bequests to religious societies, (*Williams v. Williams*, 4 *Selden*, 525,) the direction for accumulation, in the will in question, is inoperative and void.

As the fund could not be used for the designated purpose, nor indeed for any other, according to the terms of the will, except to accumulate until there should be sufficient to erect the church at Hastings, the absolute ownership would in the mean time be suspended. That might be for a longer period than during two lives in being at the death of the testatrix. The revised statutes declare that the absolute ownership of personal property shall not be suspended by any limitation or condition whatever, beyond the lives which I have indicated. That avoids the bequest in question, unless it is saved by the consideration that it is to a religious society and for pious purposes.

It has been supposed that devises and bequests to religious incorporated societies are exempt from the provisions of the revised statutes to prevent perpetuities. One reason assigned

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is, that the act relative to religious societies which at the time of its passage authorized them to hold property in effect in perpetuity, has not been repealed. It is true that religious societies might, previously to the passage of the revised statutes, have held property for an unlimited period. So might, in effect, any family. But it by no means follows that an express limitation to that effect would have, in either case, been valid. Possibly it might have been allowed to religious societies, as there was no statutory provision to the contrary. Perpetuities were not antecedently prohibited by statute. They were prevented by judicial legislation, and the same power may have sanctioned an exemption from the general rule in favor of ecclesiastical bodies. But there is nothing in our statutes relative to religious societies, requiring them to hold property given to them in perpetuity. Indeed, they are expressly authorized to sell *any* real estate belonging to them, through an order of a court of equity. (2 R. S. 210, § 11.)

According to the decision of the court of appeals, in *Robertson v. Bullions*, (1 Kern. 243, 8th proposition,) it is at least doubtful whether a religious incorporated society can take a title to real estate with a perpetual suspension of this power of alienation. Clearly these religious societies can take and hold lands or personal property for two lives, or a shorter term, under their general authority to purchase and hold real and personal estate. (3 R. S. 205, § 4.) The greater power to acquire the fee, or the absolute property, includes the less, provided that is not crippled by any illegal restriction. General laws relative to the acquisition of property and the duration of estates, ordinarily relate to corporations as well as individuals; whether the acts of incorporation are continued with or without express modification. It has never been supposed that religious incorporations were exempt from the provisions of the revised statutes prescribing the manner of making wills or contracts. Why should gifts to religious societies be in perpetuity? Is it not enough that one should control the destination of his property for two lives beyond the period

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when it can be subjected to his use? If, after that period has expired, it must be subject to the absolute disposal of those who may be controlled by new and unforeseen circumstances, can that be prejudicial to the cause of religion? Surely not, if the officers of the society should be faithful and conscientious; and if not, who can guard property from the future abuse of bad men? It seems to have been the general opinion, in England, from the time of the statute of mortmain, down to the passage of the act of 3 George the 2d, (*chap. 36*,) that donations to corporations, whether for secular or pious purposes, should be subjected to some restrictions; and in that sentiment there is a very general concurrence in this country. But if they are not subject to the restrictions, upon the acquisition and enjoyment of property, provided in the revised statutes, there are none in this state. And men who are conscience stricken, upon their death beds, may divert their property from the enjoyment of those who may have strong natural claims upon them, and appropriate it for ever to the advancement of a religion which may or may not be true.

It has been decided, however, by our court of appeals, that the general and strong language of the revised statutes, against the perpetual suspension of the absolute ownership of personal property, is inapplicable to religious societies, and that, as to them, such suspension may endure for all time to come. (*Williams v. Williams, supra*.) In differing from that high tribunal in that particular, as I do *toto in cælo*, I may be exempted from the charge of presumption, by the history of the case which I have just cited. That action was brought to annul two legacies, one to a religious society and the other to certain trustees for a charitable purpose, of \$6000 each, to accumulate by the addition of half of the income, until each should amount to \$10,000, to be held in perpetuity for purposes which permanently suspended the absolute ownership. In its different stages it was heard by eleven judges. Of those, Judge Ruggles (who had, as vice chancellor, affirmed

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the validity of those bequests,) and Judge Denio, of the court of appeals, and Justices Morse, Mason and Willard, of the supreme court, (but sitting in the court of appeals,) sustained the legacies, while they were condemned as null and void by Judges Gardiner and Johnson, of the court of appeals, and Justices Taggart, (sitting in that court,) McCoun, Barculo and Brown, of the supreme court; so that the judgment which was eventually pronounced was actually against the opinion of a majority of the judges. Possibly that may lead to a reconsideration of the questions involved, and a different determination by that high tribunal; especially as it has in some instances reversed its own decisions. (See *Brewster v. Silence*, 4 Seld. 209, expressly overruling *Brown v. Curtiss*, 2 Comst. 225; and *Durham v. Manrow*, id. 533; and *Robertson v. Bullions*, 1 Kern. 243; and an unreported case relative to a direction for charitable purposes to an unincorporated association, overruling some of the points decided in *Williams v. Williams*.)

In this court, however, I am bound by the decision in *Williams v. Williams*, and in accordance with it must hold that donations to incorporated religious societies are exempt from the provisions of the revised statutes to prevent perpetuities.

There are, however, two strong objections to the validity of the bequest to the Baptist church, in this case, which remain to be considered: First, that it could not be effectuated without violating the provisions of the revised statutes against accumulations; and second, that the proposed object was accomplished through other means in the lifetime of the testatrix. If it can be sustained at all, notwithstanding the direction for an illegal accumulation, it must be through the English doctrine of *cy pres* or approximation. In England, when property has been donated for charitable purposes, it is considered as an absolute dedication; and where the object cannot be accomplished as donated or designated by the doner, the king can, by virtue of his prerogative, through his chancellor, upon an information filed by the attorney general, devote it to some

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charitable use corresponding, as near as may be, with the original design. In the case of *Williams v. Williams*, the court of appeals made a practical application of that doctrine. There was a direction, in the bequest of the principal sum to the religious society, that one half, only, of the income should be appropriated in payment of the salary of the clergyman of the parish, until the principal should be increased by accumulation to a specified sum, nearly double of the original amount. The court decided, however, that the entire income might be paid towards the clergyman's salary from the interest. That was contrary to the donation in the will, and could only be justified, if at all, by the principle of approximation. Still, the learned judge who gave the prevailing opinion, said: "It is unnecessary to decide, in this case, whether we could proceed upon the principle of approximation, when it is impossible to execute the gift substantially according to the terms of the grant or devise. My own opinion is, that the distribution of powers among the great departments of the government, which is a fundamental doctrine in the American system, would prohibit the courts from exercising a jurisdiction so purely discretionary." In the unreported case in the court of appeals to which I have alluded, the non-applicability of the doctrine of approximation, in donations for charitable purposes, is expressly adjudicated. In the case under consideration, therefore, the legacy to the Baptist church cannot be sustained, either as a contribution towards building another church, or to defray the expenses of the edifice which was erected during the lifetime of the testatrix.

I am strongly inclined to agree with the counsel for the plaintiffs, that the trustees of an incorporated religious society have not the capacity to take property devised or bequeathed to them in trust for other societies. It is not given to them by the statute relative to religious incorporations, and they have none from any other source. The trust is not confided to the trustees as individuals, but in their official capacity,

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and as officers they cannot take property, except for the use of their society.

The remaining question is whether, as the power to sell the property of the testatrix was for the purpose of paying the legacy to the church, which has failed, as well as for the satisfaction of other legacies, it is still valid, and can be successfully executed? If the sole object of the power had been to raise the requisite funds for the payment of the rejected legacy, it would doubtless have failed. But that was one only, and not positively one, of the objects for which the property was to be sold. The main design was to effectuate an eventual distribution of the principal part of the property of the testatrix among her favored relatives. In such cases, where the principal design can yet be effectuated, although some comparatively unimportant object not expressly qualifying the delegation, (and it is not thus qualified in this instance,) may fail, the power is valid, and of course available. It would be most unreasonable and unjust to hold that a power to sell such estate, for the payment of legacies, must fail, because one of such legacies may have lapsed or failed, for any cause. The title of the defendant Lynt, to the property purchased by him, could not, as he seems to apprehend, be invalidated by any misapplication of the purchase money by the acting executor. (1 *B. S.* 730, § 66.)

No objection has been raised that the causes of action in this case could not, with propriety, be included in one suit. As the objection, if raised, might have been in effect obviated by the substitution of distinct suits for the separate causes of action, it can be effectually waived.

A decree must be entered, declaring that the proposed legacy to the Baptist church is void; that the power to sell the real estate is nevertheless valid, and that the defendant Lynt must complete his purchase.

The costs of the several parties must be paid out of the estate, or its avails in the hands of the executor.

[KINGS SPECIAL TERM, December 7, 1857. *S. B. Strong*, Justice.]

VAN PELT *vs.* VAN PELT.

Where the court is satisfied that, though a testator's capacity was slender, he yet had a disposing mind, if the evidence is sufficient to show that he fully understood, and intended to make, the disposition which he has made of his property, the will must stand, however unnatural and unjust may be its provisions.

Where the testator is unable to read or write, is extremely ignorant, is weak in understanding, and is susceptible to influence, or the victim of passion or prejudice, a simple compliance with the statutory forms of execution will not be sufficient to render the will valid.

The burthen of proof is shifted in such a case. The party propounding the will is bound to show, not only that the formal acts required by the statute, in all cases, were performed, but that the testator's mind accompanied the will; that he knew what he was executing, and was cognizant of the provisions of the testament.

If there is not sufficient evidence to establish the fact that the will was carefully read over to the testator, and that he fully understood its contents, a feigned issue may be awarded, to try that question and other questions arising upon the application to the surrogate for probate of the will.

**A**PPPEAL from a decree of the surrogate of Richmond county, admitting to probate the will of Jacob Van Pelt, deceased.

*William Watson*, for the appellant.

*Lot C. Clark*, for the respondent.

*By the Court*, DAVIES, J. The testator, Jacob Van Pelt, died on the 9th day of October, 1856, at the age of seventy-seven years. He was twice married. By the first wife he had ten children, of whom seven survived him, and two others had died not long before him, leaving issue. After the death of his first wife he married a widow having several children. There were no children of the second marriage. During his early life he was an oysterman. In his advanced years he devoted himself principally to the cultivation of his farm. He accumulated a good estate, a principal part of which consisted of his farm. For many years his sons

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labored with him faithfully in his business of oystering, and in the management of his farm ; and it is in proof that at that time he declared himself pleased with their conduct, and expressed his intention of leaving his property to those who had assisted him to earn it. He left a will dated the 22d day of September, A. D. 1845, the principal clause of which is in these words : "After all my lawful debts are paid and discharged, I give, devise and bequeath to my loving wife, my real and personal estate as it now stands, to enjoy and possess for ever, and that my said wife may have a full and perfect right to sell, give by will as she pleases, and to whom she pleases." He appointed his wife and Reuben P. Wells (by whom the will was drawn) his executors. Some of his children and grandchildren were in destitute circumstances, and it is testified as to them, there had been no unkindness of feeling on the part of the testator, though to some of his sons there is evidence that he entertained feelings of displeasure, if not of enmity. Without stating particularly the testimony of the several witnesses called and examined before the surrogate, it may be said the following facts are proved :

The will was drawn by Reuben P. Wells, who seems to have been a justice of the peace, residing in the neighborhood of the testator. The directions for drawing the will were given by the testator himself, the wife not then being present. The will was forthwith drawn, was read by Wells to the testator, and was then executed in presence of the other witnesses, one of whom was the brother of the testator's wife. The certificate of its execution and acknowledgment was in due form ; but the will was not read to the testator in the presence of either of the witnesses, nor did they know that the testator was aware of it, or understood the contents of the paper. .

The daughter of Wells had, a year or two before the execution of the will, married the son of Mrs. Van Pelt, the testator's second wife. Wells was on intimate terms with Mrs. Van Pelt and the testator, and was made the custodian

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of the will from its execution till the death of the testator. Neither the making nor the contents of the will were made known to the children of the testator.

The testator was a man wholly without education. He could neither read nor write. His natural capacity would seem to have been not very inferior, but to have been wholly undeveloped, except as to the acquisition of money. But even in that direction, it was not so developed as to enable him to compute, except in small sums, or to very limited amounts. He could not discriminate between bank bills of various denominations, except between one or two dollar bills and five dollar bills. The common coin in circulation he seems to have known. But some of the witnesses state that if he sold a load of hay of one thousand pounds' weight at one dollar and fifty cents a hundred, or a skiff-load of oysters at fifty cents a hundred, he could not tell how much the loads came to. For many years he was accompanied by his sons and others when selling oysters in the city, and they would compute the price of his oysters, receive and count the money, and pay it over to him. After the will was executed, one witness (Brown) states that when the testator wished to compute the price of a thing, and no person was present to do it for him, he would do it by beans. "He would take and count eight big beans for a dollar, and small ones for sixpence." For many years before his death his conversations were rambling and disconnected. During all his life, it would appear from all the testimony, that his mode of conversing and speaking was singular, so as frequently to be difficult of comprehension, especially to those not intimately acquainted with him. He was a man of quick and sullen temper, of violent passions, of great obstinacy, and strong prejudices. If irritated against any persons, he was bitter and rough in his conduct towards them. But if his confidence was obtained, he was very much under the influence of the person who had won it. He was very suspicious. Several witnesses state that he did not know the difference between facts wit-

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nessed by himself and information derived by hearsay, and that he would testify positively, and as if upon his own knowledge, to matters that he merely heard stated, not distinguishing between hearsay, or supposition, and fact.

The witnesses for the appellant speak of his mental capacity as being very limited, as do several of the witnesses for the respondent. But this incapacity was rather the result of an entire want of education, and of an indulgence in passion, than of a defect of understanding. When a matter which, stated in ordinary language, was quite beyond his comprehension, was explained to him in terms with which he was familiar, he could understand it, especially if the explanation was slowly and deliberately made. His memory was formerly good within the range of subjects with which he was conversant; but for ten or twelve years before his death it had become much impaired.

Though commonly prudent and shrewd in the management of his pecuniary affairs, it is abundantly clear from his conduct at the division of his father's estate, that if his passions or prejudices were aroused, he utterly lost sight of his own interest. His conduct at the time of his mother's funeral shows that he was equally blinded by passion to obligations, which are usually the most powerful over the minds of men.

We are all of opinion, however, that though the testator's capacity was slender, he had still a disposing mind; and if the evidence is sufficient to show that he fully understood, and intended to make, the disposition which he has made of his property, the will must stand, however unnatural and unjust may be its provisions.

Does the evidence in this case show that fact? In other words, when the testator is unable to read or write, is extremely ignorant, is weak in understanding, and is susceptible to influence, or the victim of passion or prejudice, will a simple compliance with the statutory forms for a valid testamentary act, be sufficient to sustain the will?

It has been said by a most learned jurist, who has illustra-

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ted the surrogate's court of the most populous county in the state for several years, and the too early termination of whose judicial services is a public loss, that the statutory forms "are necessary, but even when satisfied by the evidence, do not always entitle the will to be admitted to proof. Something more is necessary to establish the validity of the will in a case where, from the infirmities of the testator, his impaired capacity, or the circumstances attending the transaction, the usual inference cannot be drawn from the mere formal execution. Additional evidence is therefore required, that the testator's mind accompanied the will, and was cognizant of the provisions of the will." (*Wier v. Fitzgerald*, 2 *Bradford's Sur. Rep.* 69.)

In the case of *Mowry v. Silber*, (*Id.* 133,) the decedent was seventy-five years of age, his mind and memory were impaired, and though he was not legally incompetent to make a will, it was properly held that a testamentary disposition of his property ought not to be sustained unless proved to have been fairly made, to have emanated from him of his own free will, without interposition of others, and to have accorded with his intentions, otherwise expressed, or implied from the state of his family relations. It was declared not to be enough, in such a case, to show that instructions were given by the testator, especially when he was so situated that the instructions might have been procured by undue influence. And it was there held that, in case of an unequal will, executed by a person weak in mind and body, at the house of the party most largely benefited, the execution of which was not communicated to the children of the decedent, and the provisions of which were not in harmony with his previously expressed intentions and dispositions, the ordinary presumptions flowing from the formal act of execution, did not obtain; that the burden was thrown on the party seeking to establish the testamentary act of proving that precautions were taken, and explanations had, to secure to the testator the full and free action of his impaired faculties; and that in

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such a case the order of proof was reversed, and it should be shown affirmatively that no imposition was practised.

It was, as I understood it, upon substantially the same grounds that the same learned judge put the decision in the recent and very interesting will of *Henry Parish*. The will and the earlier codicils were sustained; for when they were made, the testator was in possession of his powers and faculties, and fully able to communicate his intentions to others. The later codicils were rejected, though the formal acts of execution seem to have been performed. But the power of the testator was so far weakened, and he was so situated, as to expose him peculiarly to the exercise of undue influence, while his ability to make known his precise wishes was rendered at least very questionable.

Substantially the same ground has been laid down in numerous other cases. Thus, in *Chaffee v. The Baptist Missionary Convention*, (10 *Paige*, 85,) the chancellor said that when the testator was illiterate and incapable of reading and writing, it was proper the whole should be read over to him, in the presence and *hearing* of the witnesses; and that the fact of such reading in his presence, should be stated in the attestation clause, or at least the witnesses should, by inquiry of such illiterate testator, ascertain the fact that he is aware of the contents of the instrument which he executes and publishes as his will; and that he is possessed of a competent understanding to make a testamentary disposition of his property. The learned chancellor decided, however, that the neglect of these provisions will not render the will invalid, if the court and jury before whom the question of its validity is tried, are satisfied, upon the whole evidence, that the will was duly executed, and that the testator understood its contents.

Without stopping to cite other authorities to support these views, as might be easily done, I think it may be stated as a general rule, that where the circumstances which attend this case are found—the age, the ignorance, the inability to read

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or write, the exposure to influence on the part of the testator, the conceded fact that he is, and has for many years been, wholly swayed by passion and prejudice—there the mere compliance with the statutory formalities of execution is not sufficient. The burden of proof is shifted. The party propounding the will is bound to show, not only that the formal acts required by the statute in all cases were performed, but that the testator's mind accompanied the will ; that he knew what he was executing, and was cognizant of the provisions of the testament. The true question presented by this case is, whether the proponent has succeeded in assuming this burden and establishing this fact. For my part, I do not think she has. At the utmost, it can only be said that her proof leaves the question in doubt. I think it hardly does that.

In the first place, the main provision of the will, that which gives to the wife the ultimate power of disposition over the property after her own life, is at variance with every feeling of nature in the testator. For the natural result of that provision must be to send the property from his own name and blood to strangers. Such a result is at war, too, with feelings which the testator had entertained and declared, for many years before the will was made, and which he freely expressed about that time, and frequently afterwards, till near his death.

Though the state of his feelings towards some of his sons might warrant the belief that he designed to disinherit them, there is no poof of any such intention towards others of his children, or towards any of his grandchildren ; the proof being that he was always kindly disposed to the latter, and that some of them were in destitute circumstances. Although it is plain that the older children had but little intercourse with their father or the inmates of his household, after the second marriage, and had, therefore, but little opportunity of proving the direct exercise of undue influence over the testator, by his wife, yet the case is by no means free from circumstances

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which strongly indicate such an influence. The witness Brown, the principal if not the only witness who was an inmate of the testator's family during his last years, states, that Mrs. Van Pelt often spoke against his children, to the deceased ; she dwelt frequently on the fact that Prior (one of the sons) owed the old man and would not pay him ; and she said that he (testator) was a fool to let him have any thing without he paid for it. So Parker states that Mrs. Van Pelt had great influence over her husband, in many instances.

Seven witnesses on the part of the contestants, all of whom knew the testator intimately and for long periods, give it as their opinion, that the testator had not sufficient knowledge to understand, without explanation, that such a will as he did sign, would enable his wife to give the estate by will away from his own children. Monel, a witness called for the purpose, says that he thinks the testator had capacity to understand the will, if it *was read and explained to him in plain words ; very plain, he adds, they ought to be, for he had no education.* The other witnesses for the proponent do not materially contradict this statement, thus strongly fortified. They speak of certain particulars, in which the capacity of the testator seemed greater to them than the witnesses on the other side had stated it to be. And Doctors Eddie and Harrison think that his capacity to make a disposition of his property by will about an average one. But they had only a limited acquaintance or intercourse with him ; and though very intelligent witnesses, their opinions, under the circumstances, do not by any means outweigh those of the eight witnesses on the other side.

It was insisted, at the argument, that this evidence of opinion, on the part of the witnesses for the contestants, was inadmissible, within the case of *Dewitt v. Barley*, (5 *Selden*, 371.) That case, however, expressly concedes that in the ecclesiastical courts such evidence has generally been admitted, and is authority only as to what is or is not admissible in tri-

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als in actions at law. The reasoning of the learned judge, who delivered the prevailing opinion, does not seem to me to apply to the courts christian, where judge and jury are both one.

The only testimony in the whole case to show that the testator was made aware of the effects of the will, or understood its provisions, is that of Wells. He says he took the instructions for drawing the will from the testator himself, and that when drawn he read it over to him. There is not a word of his explaining its effect or results. It was simply read to him, without comment or explanation. To my mind, the instructions given to Wells for drawing the will bear the marks of influence. They show that his mind had been carefully prepared for giving them. But they do not indicate any thing more than he told Parker he meant to do, just about the time the will was made: *That as his wife had been a good wife, she should have a good home as long as she lived.*

The only proof then, that the testator was made aware of the contents and effect of the will, is this simple declaration of Wells. But he was under very strong influences to sustain the will. His daughter had married the son of Mrs. Van Pelt, the sole devisee and legatee under this will. If the will was established, the whole of the property might, a very considerable part almost certainly would, come to his son-in-law and daughter. Nor is Wells' testimony free from suspicion. Though that marriage took place two years before the execution of the will, he was unable upon his cross-examination to state whether the marriage was prior or subsequent to the execution of the will.

Upon the whole case, I do not deem the evidence sufficient to meet the requirements which the law imposes on the party propounding such a will as this for probate.

The case of a blind man was mentioned at the argument, and it was sought to show that what was done in this case was sufficient to uphold the will of a blind person. No doubt

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there may be cases where, from the blindness being congenital, the testator may be wholly unfamiliar with affairs, and peculiarly exposed to undue influence. A will made by such a one, especially if it was at variance with the declarations or known intentions of the testator, might require to be read over to him in the presence of the witnesses, its contents explained, and the capacity of the testator inquired into and ascertained. But in case the blindness had supervened late in life, and upon a man of business, familiar with the world, then, I feel no doubt, it would be sufficient if he gave instructions for drawing the will, and if it could be proved that it had been read over to him, though not in the presence of the attesting witnesses. Especially would this be so, if there were no violence done by the will to the natural claims of kindred, and the declared intentions of the testator. In such a case, the only question would be whether the paper executed as the will had been honestly and truly read over to the testator, before his execution of it.

The testimony of an unimpeached, impartial and disinterested witness, that such a will had been carefully read over to the testator, that he fully understood its contents, added to the testimony of the attesting witnesses, and the compliance with all the statutory forms, would seem to leave no doubts that the paper propounded was the will of the testator. This fact must be satisfactorily established, before any court is justified in allowing the paper writing produced, to be probated as the will of the testator. In my judgment, there is not sufficient evidence in this case to establish that fact. I am not satisfied that it is the will of the testator in fact; and not being so satisfied, the order of the surrogate cannot be affirmed, but should be reversed.

The decision of the surrogate admitting the will to probate was erroneous, and must be reversed. But this reversal being upon a question of fact, a feigned issue must be made up to try the questions arising on the application to prove the will; and the same must be sent for trial to the next circuit

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court, to be held in Richmond county. The costs of this appeal, to the appellant, may abide the event of that issue, to be paid out of the estate if he is finally successful.

[KING'S GENERAL TERM, February 9, 1858. *S. B. Strong, Davies and Birdseye*, Justices.]

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 FRELIGH vs. BRINK and SNIDER.

A judgment, entered by confession, upon a statement in these words: "The above indebtedness arose on a promissory note made by the defendants to the plaintiff, dated June 21, 1854, in the sum of \$700, with interest, that amount of money being had by the defendants of the plaintiff, and upon which there is this day due the sum of \$782.07, together with \$80.41, now due the plaintiff from the defendants as costs in an action brought against the defendants by the plaintiff on said promissory note, in the supreme court, which suit is now discontinued by the plaintiff upon this confession of judgment to him by the defendants," set aside, on the ground of the insufficiency of the statement.

**M**OTION to set aside a judgment entered by confession, on account of the insufficiency of the statement.

*Schoonmaker & Westbrook*, for the motion.

*E. Whitaker*, opposed.

BROWN, J. Jeremiah Russell, a judgment creditor of the defendants, Brink and Snider, moves to set aside the judgment entered by confession in this action, for the insufficiency of the statement, which is in the following words: "The above indebtedness arose on a promissory note made by the defendants to the plaintiff, dated June 21, 1854, in the sum of seven hundred dollars, with interest, that amount of money being had by the defendants of the plaintiff, and upon which there is this day due the sum of seven hundred and eighty-two dol-

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lars and seven cents, together with eighty dollars and forty-one cents, now due the plaintiff from the defendants as costs in an action brought against the defendants by the plaintiff on said promissory note, in the supreme court, which suit is now discontinued by the plaintiff upon this confession of judgment to him by the defendants."

So much of the statement as refers to the promissory note as the fact out of which the debt arose, is of no avail to sustain the judgment, upon the authority of the case of *Chappel v. Chappel*, (2 *Kernan*, 215,) for the reason there given, that the note is but presumptive evidence of the debt, and not the debt itself, which arose out of facts *dehors* the instrument, and antecedent to, or simultaneous with, its execution. The reference to the note is immediately followed by the words, "that amount of money being had by the defendants of the plaintiff." And the force and validity of the judgment would seem to depend solely upon the sufficiency of the fact therein stated. The case of *Chappel v. Chappel* is also authority for the construction, that "the object of the statute is to improve the condition of other creditors, by compelling parties to spread upon the record a more particular and specific statement of the facts out of which the indebtedness arose; thus enabling them by a comparison of that statement with the known circumstances and relations of the debtor, to form a more accurate opinion as to his integrity in confessing the judgment than was possible under the former system." In *Dunham v. Waterman*, (6 *Ab. Pr. Rep.* 357,) the court of appeals also determined that section 383 of the code was designed to require, by implication, what the act to prevent abuses in the practice of the law, &c. passed April 21, 1818, required by express words; that is to say, a particular statement and specification of the nature and consideration of the debt or demand, and in case such demand should arise upon a note, bond or other specialty, that the origin and consideration of the same should be particularly set forth. *Lawless v. Hackett*, (16 *John.* 149,) arose under the act of 1818; and it was

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there held, that a statement as general as the common counts in a declaration was not sufficient. In *Dunham v. Waterman* the statement was a note given upon settlement of accounts, which was held insufficient, and the doctrine was reasserted that a statement as general as the common counts was insufficient to sustain the judgment. The account stated, and the *indebitatus assumpsit* for money had and received, &c. were both common counts under the old forms of pleading; and we have seen that a statement of a debt as general as either is ineffectual to sustain a judgment by confession. The language of the statement in this case is quite as general, and is indeed substantially the same as the language of the count for money had and received, and falls within the principle of the two cases to which I have referred. To say "that amount of money being had by the defendants of the plaintiff," without saying when and in what sums had, or under what circumstances, and for what objects or purposes—whether as a gift or a loan, or for money collected and misapplied, or in payment of property not delivered, or upon any other contract which the defendants failed to execute—is to withhold and conceal from the other creditors of the defendants the most material facts out of which the debt arose. Suppose the statement had said that the sum of seven hundred dollars was for so much money paid by the plaintiff for the defendants, without saying in what sums, at what times, to what persons, or for what objects and purposes, could it have been regarded as sufficient? Would it have furnished the creditors with any useful information? And would not such a lean and narrow statement have been a clear and palpable evasion of the spirit of the statute as construed and expounded by the court of appeals?

Regarding the statement as wholly inadequate to sustain the judgment, the motion to set it aside is granted, with ten dollars costs to the moving party.

[DUTCHESS SPECIAL TERM, June 14, 1858. *Brown*, Justice.]

FAIRCHILD *vs.* BENTLEY and SWEET.

To hold the owner of a dog liable for an injury committed by him, it must appear that the dog was vicious and the owner knew it, or that he was a trespasser, at the time of doing the injury. *Per* CAMPBELL, J.

If an individual knows that his dog is in the habit of following teams driven by such person, and of watching them after they are hitched and left by him; and if he knows that such dog is accustomed to attack and bite strangers approaching teams so watched, he is liable for any injury done by the dog to a person lawfully approaching the team for the purpose of unhitching it. MASON, J., dissented.

A man owning such a dog, knowing its character, must secure it at home, so that it will not follow him. If it follows him, and bites a person rightfully coming to remove the team from an inn-shed where the owner has left it, and where the dog is watching it, such owner is liable in damages. MASON, J., dissented.

Whether, in such a case, a dog has a right to follow his master and lie down in the open shed of a public inn, or whether he is, *quoad* the master, an involuntary trespasser, the master is not liable, in an action of trespass, for the injury done by him, without proof of knowledge of his vicious habits. *Per* CAMPBELL, J.

THIS is an action on the case to recover damages for the bite of a dog. The cause was tried at the Cortland circuit, July, 1857, before Justice MASON, and a verdict rendered for the plaintiff against the defendant Bentley, for \$50 damages. The defendant Sweet was acquitted on the trial, there being no evidence against him. The court ordered a stay of proceedings, and that the cause be heard in the first instance at general term. The plaintiff in his complaint, after setting forth that the dog attacked and bit him, proceeds to say: "And said plaintiff further alleges, that before, and at the time of the injury herein before alleged, *the said defendants well knew that the said dog was a fierce, ferocious and dangerous dog, and that he had [attacked and bitten] and was used and accustomed to attack and bite mankind.*" The defendants answered, denying each and every allegation in the complaint. From the evidence it appeared that the dog belonged to Bentley, who lived about four miles from Cortland village, and that on the day of the accident the dog followed the sleigh in which Bentley rode, to the village. When he

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started, the dog followed him for a short distance, and he then got out and drove the dog back. He saw no more of the dog until after the accident. The person with whom Bentley rode, drove his sleigh into the yard of the Eagle Tavern and left it, having hitched the horses to a place pointed out by the hostler. The owner of the team, with Bentley, then went into the Eagle Tavern, where they purchased and paid for cigars and beer. After this they went about the village. It did not appear when the dog came to the village, but he was found soon after by the plaintiff (who was the son of the proprietor of the Eagle Tavern) watching the team. The horses being hitched near a wagon belonging to the plaintiff's father, they were found gnawing the end board, whereupon the plaintiff took hold of the horses' heads to back them away. The dog then jumped up and bit the plaintiff in the groin, which was the injury complained of. The dog appeared to have been irritated by boys throwing snow balls and other missiles at him. *There was no proof that the dog had ever bitten any person previous to this time, or that he was a savage or dangerous dog.* One witness testified that previous to the accident in question, he attempted to take hold of a team that the dog was watching, and that the dog growled. The defendant Bentley knew nothing against the character of the dog until he bit the plaintiff; and a witness for the plaintiff, at whose house the dog was kept, testified that she thought him a mild and peaceable dog. It was proved (under the defendant's objection) that in April after the accident in question, the dog bit a small boy who was passing near a barn where the dog was kept, and also that he jumped upon another person who came upon him suddenly, and that he snarled at the same man at another time.

The defendant Bentley, upon a case and exceptions, moved for a new trial.

*B. H. Duell*, for the defendant. I. The defendant is not liable as a trespasser, for the injury committed by his dog. (1.) The defendant was a guest of the innkeeper. (*McDonald*

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v. *Edgerton*, 5 Barb. 560.) (2.) If the dog was trespassing at the time, the defendant is not liable without proof of the *scienter*, as the *plaintiff was not the owner of the close* and cannot recover for any injury done to it. The cases where a recovery has been had without proof of a *scienter*, is *where the breaking and entering the close is the substantive allegation, and the rest is laid as matter of aggravation merely.* (*Van Leuven v. Lyke*, 1 Comst. 515, 517.) (3.) In the case at bar, the liability of the defendant was not put upon the ground of his being a trespasser, and therefore the point does not arise here.

II. The judge erred in charging the jury that if the dog was vicious and dangerous only to strangers passing by him when watching a team, then the defendant was liable without proof of the defendant's knowledge of the vicious and dangerous propensity of the dog. The law seems to be well settled, both in our courts and in those of England, that as any person may keep a domestic animal, the owner is only liable for an injury it may do upon the ground of some actual or presumed negligence on his part. It is essential to the proof of negligence that the owner be shown to have had notice of the propensity of the animal to do mischief. Therefore in this case, as the plaintiff gave no evidence that the defendant had notice of the dog's propensity to do mischief, the action cannot be sustained. (13 *John*. 339. 1 *Denio*, 495. 17 *Wend*. 496. 4 *Denio*, 500. 4 *Cowen*, 351. 4 *Denio*, 127. 1 *Coms*. 515. 4 *Denio*, 175. 13 *John*. 312. 23 *Barb*. 324.) In England it has been held that an action for keeping a ferocious dog, which bit the plaintiff, (the defendant well knowing the dog to be ferocious,) does not lie, unless the defendant knew that the dog was accustomed to bite. (*Hogan v. Sharpe*, 7 *Car. & Payne*, 755. *Beck v. Dyson*, 4 *Camp*. 198. *Thomas v. Morgan*, 2 *C., M. & R.* 496.) The judge at the circuit held, in substance, that any person who keeps a watch dog that is dangerous to strangers when watching, is liable for an injury caused by the dog, although he has no notice that the dog was

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dangerous to strangers while thus watching. With due respect to the decision of the learned justice, it is submitted that no case has yet gone that length. There is a class of cases holding that where an animal is by *nature* fierce and dangerous, as a lion, tiger and the like, the person who keeps him is liable for any damage he may do, upon the principle that such animals, being fierce by nature, *notice is presumed*. On the other hand, in the case of domestic animals not naturally inclined to do mischief, such as dogs, horses and the like, the owner must be shown to have had notice of their viciousness before he can be made liable for their injuries, (*per Jewett, J., 1 Comst. 516.*) *In both cases notice is essential; but while in one case actual notice must be shown, in the other it is presumed.* The error complained of in this cause is in placing the owner of a dog, dangerous only to strangers while watching, upon the same level as the owner of a lion, tiger, or other animal *fierce by nature*, and in holding that neither actual or presumed notice was necessary to be shown in order to make the defendant liable. Had the judge assumed that proof of the vicious and dangerous character of the dog while watching, *was equivalent to express notice*, or if it shall be contended that such is the effect of his charge, then we say, that there is a distinction between the presumption arising from the proof that an animal is of a ferocious and dangerous *nature*, or in other words, *naturally* savage and dangerous, and that of the presumption arising from the proof that the dog had an acquired habit making him dangerous only in a particular position. A man may be presumed by a jury to know that an animal fierce by nature is a dangerous animal; but it would be violence to presume him to know that his domestic animal has a dangerous habit, especially if that particular habit is contrary to his nature.

III. For the reasons stated in the last point, the court erred in refusing to nonsuit the plaintiff, and in refusing to charge as requested.

IV. The court erred in refusing to charge the jury that they

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could only find the fact of the dog being vicious and dangerous from the prior history of the dog, *and not from his conduct on the occasion when he bit the plaintiff, or from the subsequent acts of the dog*—and in charging the jury that they might find the bad character of the dog from all the evidence in the case, both before and *after the act complained of*, and from the act itself. (1.) The accident occurred Feb. 23, 1855; the suit was commenced Feb. 26, 1855; the defendant parted with the dog six or eight days after the accident. The vicious acts of the dog took place in April, 1855, and long after the defendant parted with him. The vicious and dangerous habits of the dog were likely to be, and probably were, engendered by the act of biting the plaintiff and by subsequent treatment. Was it right that the defendant should be prejudiced by evidence which was got up after the suit was commenced? (2.) If the dog's conduct subsequently is allowed to be shown, to establish what his prior character was, it would imply that the character of the dog could not change, and was entirely unaffected by circumstances; whereas the habits, disposition and character of domestic animals undergo a change, as much as those of men, depending upon a variety of circumstances. It would hardly do to say if an individual commits a crime to-day, that therefore his character was bad months or years before, or that because a money lender is now in the habit of taking usury, therefore it is evidence of his habit formerly. (*Jackson v. Smith*, 7 Cowen, 717.) (3.) The burden of the proof was upon the plaintiff to show the dog to be vicious and dangerous; the presumption being that the character of the dog was good up to the time of the accident. Could this presumption be overcome by proving his bad character *subsequently*, any more than in the case of an individual whose character at a certain period is in question? (2 *Wend.* 352.) (4.) If the defendant was only liable upon the ground of actual or implied notice of the vicious and dangerous character of the dog, then the evidence was improper, as the defendant cannot be presumed to have had previous notice of a

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vicious propensity which the dog acquired by the act of biting the plaintiff, and by subsequent treatment.

V. The evidence as to vicious acts of the dog after he bit the plaintiff, was improperly admitted, for the reasons stated in the last point. A new trial should be granted.

*H. Ballard*, for the plaintiff.

CAMPBELL, J. The complaint in this cause states two grounds on which a recovery is claimed : First, that the defendant wrongfully and without leave, having in his possession and keeping a large, cross, ferocious and dangerous dog, entered upon the premises of the plaintiff's father, and where the plaintiff was employed and lived with his father, whereupon the dog, without provocation and without the fault of the plaintiff, ferociously attacked and bit him ; and, second, that before and at the time of the injury, the defendant well knew that the dog was ferocious and dangerous, and accustomed to bite mankind. At the close of the case on the part of the plaintiff, the defendant moved for a nonsuit, on the ground that there was no evidence to charge the defendant with knowledge of the dog's vicious habits, which motion was denied, and renewed again at the close of the whole evidence in the case, and again denied ; to which ruling the defendant excepted.

The defendant then requested the court to charge the jury, that the defendant could not be held liable, unless he was shown to have had knowledge of the dog's propensity, and the court refused so to charge ; to which refusal there was an exception. The judge charged the jury, that if they found the fact that the defendant's dog was in the habit of following a team after which the defendant rode, and of watching such team, and that he was a dangerous and vicious dog to strangers passing by, when watching such team, and the jury should find the fact that he bit the plaintiff under the shed of the plaintiff's father at the public inn, in the manner and

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under the circumstances testified to by the plaintiff and his witnesses, then the defendant was liable without proof of the defendant's knowledge of the vicious and dangerous propensities of the dog, and although he might only be vicious and dangerous to strangers passing when he was watching.

The defendant had previously requested the judge to charge, that if the jury found the fact as proved by the plaintiff's witnesses, as to the hitching of the horses at the shed of the plaintiff's father, &c., and the biting of the plaintiff, it was not sufficient to charge the defendant, unless the defendant had knowledge. There was a refusal so to charge, and an exception.

Without stopping now to consider whether there was sufficient legal evidence to warrant the jury in finding, that at and previous to the injury, the dog was a vicious and dangerous dog to strangers passing by, when he was watching a team which he had followed; that is, that he would bite such strangers, for he could not be dangerous otherwise, inasmuch as the question whether the defendant had knowledge was wholly withdrawn and excluded from the consideration of the jury, it seems to me that the case narrows down to the single question, whether the dog was a trespasser on the premises of the plaintiff's father.

The plaintiff's father was the keeper of a public inn; he was obliged by law to provide food and lodging for travelers, and stabling and provender for their beasts. The defendant came as a traveler, entered the inn, and with his fellow traveler called for beer and cigars, and thus became the guest of the house. (*McDonald v. Edgerton*, 5 Barb. 560.)

There is a contradiction as to the team: the hostler swearing that he gave no directions as to the hitching, and the defendant's witness, Cran, saying that the hostler pointed out the place where the team was hitched, and told him he might hitch it there. This was in front of the shed. The dog was not there then, but was afterwards found lying under the shed and immediately in front of the horses. The plaintiff

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seeing the horses injuring the wagon of his father, was about unhitching them, when the dog bit him. It was a shed belonging to the inn where the master was a guest, and where the team after which the master rode was hitched. It does not seem to me that the dog could, under the circumstances, be considered a trespasser, any more than if he had been found lying in front of the team in a public highway. It is true that a dog is not a necessary traveling companion, though often a very pleasant and useful one, and I would be unwilling to hold, that when he followed the master where the master had a right to go, he could always be treated as a trespasser. Certainly the least exceptionable place where a traveler's dog could be placed would be by his horses, under the shed of a public inn. The dog, almost universally considered and treated as the faithful friend of man, following him in his labor, his journeyings, and his sports, takes the place among domestic animals, which he owns and uses for his protection and his pleasures. The master has property in him, as in his horse, and the same rule must apply. To hold the master liable, it must appear that the dog was vicious, and the master knew it, or that he was a trespasser at the time of doing the injury. Certainly if the plaintiff had been injured by the bite or the kick of one of the horses at the time he was unhitching them, it would hardly be contended that the owner was liable, unless it had appeared that the horse was vicious, and prone to kick or to bite.

I hardly think that the evidence of subsequent bad conduct of the dog was admissible. In the case of *Dean v. Clayton*, (7 *Taunton*, 489,) Best, justice, cited a decision of Lord Mansfield, in a case where an ox, driven to market, was tranquil when it left, and became frenzied and gored the plaintiff, held an action would not lie. The animal, the dog for instance, may have been tantalized and annoyed and made cross. Hence the necessity of proving previous bad character, and that it was known. The subsequent bad character proves little. Besides, in this case the defendant parted with the

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dog, and subsequent treatment and training may have much to do with subsequent bad conduct.

But there is another view of this case, as regards the question of trespass. The dog was in the shed, not in accordance with, but against, the will of the owner. In the same case of *Dean v. Clayton*, Mr. Justice Park says: "A man may, and easily can, control his horse, but he cannot his dog." A dog might not be considered an intruder or trespasser, where an ox or a horse would. In this case, the defendant drove the dog back when he was leaving home; and conceding that the dog had no right to lie down in the shed, yet the trespass was involuntary and excusable. For the trespass itself, I do not think an action would lie. When the plaintiff's dog chased a hare on to the defendant's ground, and was killed by a dog spear, and such chasing was involuntary and against the plaintiff's will, Dallas, justice, says in the case before alluded to, "that if the action had been by the defendant against the plaintiff for the trespass, it would have been a defense."

There is an exception created by statute. By the statute law of this state, the owner or possessor of a dog is liable for any sheep killed by such dog, without previous notice to the owner or possessor that the dog was mischievous, or disposed to kill sheep. (1 R. S. 704, § 9.) In such case, and though the dog may trespass against the owner's wishes, and without his notice or consent, the owner or possessor is liable. The statute, then, makes the owners of dogs liable, while owing to the decision in *Van Leuven v. Lyke*, (1 Comst. 515,) the owners of horses, sheep, swine, &c., are liable at common law, because the owner of such animals can restrain them, and is therefore bound at his peril to confine them on his own land; and if such animals are improperly in another's close and there commit mischief, the owner is liable, without alleging or proving a scienter. No law would be requisite, that is, no statute, if the owner was at common law liable for the involuntary trespass of his dog. From the peculiar nature and habit of the animal, it may be seen at a glance,

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how great is the distinction between the trespass of an ox or horse, and that of a dog. The statute makes, and the common law recognizes, this distinction. In either view of this case, whether the dog had a right to follow his master, and lie down in the open shed of a public inn, or whether he was, *quoad* the master, an involuntary trespasser, I do not think the defendant liable in this action, without proof of knowledge of vicious habits. It is a serious injury to the plaintiff, and one much to be regretted ; but it belongs to that class of misfortunes to which we are all subject when there is an injury without accountability, and which the law denominates *damnum absque injuria*. There must be a new trial, with costs to abide the event.

BALCOM, J. The conclusions to which I have arrived, after examining the question presented by the case and exceptions in this action, are briefly these: If the defendant knew his dog had the habit of following teams after which he rode, and of watching them after they were hitched and left by the defendant, and if he knew his dog was accustomed to attack and bite strangers to him, who approached teams which he watched, the defendant is liable to respond in damages for the injury his dog did to the plaintiff.

A man who owns such a dog, knowing its character, must secure it, so that it will not follow him when he rides to an inn, after a team, which is left in a barn, or shed, or upon premises used by the innkeeper in taking care of the teams and vehicles. If it follows him, and bites a third person, who lawfully and rightfully approaches or meddles with the team so left at the inn, the owner is liable, although the dog be watching the team at the time.

The plaintiff had the right to unhitch and remove the team, which the dog was watching at the time he tried to do it, and the dog was wrongfully there ; and if it had the habit above mentioned, to the knowledge of the defendant at the time the plaintiff was bitten, the plaintiff should recover.

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I think the judge erred at the trial, in laying out of view the question, whether the defendant had knowledge of the habits of his dog at the time the plaintiff was bitten; and for this reason, I am of the opinion there should be a new trial; costs to abide the event.

MASON, J., dissented.

New trial granted.

[CORTLAND GENERAL TERM, November 9, 1858. *Mason, Campbell and Balcom*, justices.]

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HOUSE and others *vs.* COOPER and others.

An action claiming equitable relief on behalf of a foreign corporation, brought in the name of stockholders thereof, against another foreign corporation, a corporation formed under the laws of this state, and several individuals who do not appear to be residents of this state; in which action the complaint does not state that the plaintiffs are residents of this state, so as to entitle them to maintain an action against a foreign corporation for any cause; and in which it does not appear that the cause of action has arisen, or that the subject of it is situated, within this state, cannot be maintained.

In order to warrant the bringing of an action by individual stockholders, in their own names, to set aside a sale, it is necessary to show that the constituted officers of the corporation, whose especial duty it is to vindicate its rights, have been requested to institute proceedings for that purpose, and have refused to do so.

In an action for equitable relief against a corporation, it is improper to join, with that cause of action, a claim for damages against individual defendants.

**M**OTION to dismiss the complaint.

CLERKE, J. This court has frequently decided that an action may be maintained for a damage sustained by a stockholder from illegal and fraudulent acts of directors and officers of a company. But this action contemplates much more than

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this. It claims the equitable interposition of this court on behalf of the Boston and New York Telegraph Company, incorporated and existing in Massachusetts, against the Commercial Telegraph Company, also incorporated and existing in Massachusetts, against the American Telegraph Company, formed under the laws of this state, and against several individuals, who it does not appear are residents of this state.

So far as the two corporations of Massachusetts are concerned, I cannot perceive how this action can be maintained against them; and if it cannot be maintained against them, I am unable to discover how it can be maintained at all. For no effectual relief can be given without retaining those corporations as parties in the action. An action against a foreign corporation can be brought in the courts of this state only, 1st. By a resident of this state, for any cause of action. 2d. By a plaintiff not a resident of this state, when the cause of action has arisen, or the subject of the action is situated, within this state. The complaint does not state that the plaintiffs are residents of this state, to entitle them to maintain an action against a foreign corporation for any cause of action; and further, it does not appear that the cause of action has arisen, or that the subject of the action is situated, within this state. On the contrary, it appears, and is affirmatively alleged, that the cause of action arose in the state of Massachusetts.

The complaint also omits to state that the directors of the Boston and New York Telegraph Company, on whose behalf the plaintiffs undertake to sue, refuse to bring any action to set aside the sale to Keith. Kennedy says that they *will* not bring any such action. I think it is necessary to show, in order to warrant the interference of individual stockholders, that the constituted representatives of the company, whose especial duty it is to vindicate its rights, have been requested to institute proceedings for that purpose, and have refused to do so.

The defendants' fourth objection to this complaint I also consider to be well taken. In this action, which is one for

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equitable relief, the plaintiffs join a claim for damages against individual defendants. This is an improper joinder of causes of action. The one seeks redress that can be determined only by a judge presiding at special term; the other can be determined only by a jury, at the circuit, except where the parties expressly waive a jury, at the time of trial. For this and other reasons which it would be superfluous to mention, this action cannot be maintained; at least in its present shape.

Complaint dismissed with costs, unless the plaintiffs amend their complaint within ten days and pay the costs of the term.

[NEW YORK SPECIAL TERM, April 5, 1858. *Clarke*, Justice.]

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THE CUMBERLAND COAL AND IRON COMPANY *vs.* THE HOFFMAN STEAM COAL COMPANY, and others.

Although foreign corporations may, in some instances, sue or be sued in the courts of this state, yet, to warrant the proceeding, there must be either a necessity, or a fitness suggested by the peculiar circumstances.

The cause of action, or the subject, or at least some property to be acted upon, must have arisen, or be situated, within our jurisdiction.

The courts of this state will not entertain jurisdiction of a suit between two corporations, both chartered by the laws of Maryland, respecting lands lying in that state, the object of which suit is to annul a conveyance of such lands made to the defendants, on the alleged ground of fraud, which conveyance was executed and acknowledged in Maryland, and put upon record there. *DAVIES J.*, dissented.

THIS was an appeal from an order made at a special term, setting aside the summons, complaint and all subsequent proceedings in this action, as to the defendants, The Hoffman-Steamm Coal Company.

The following opinion, delivered on the decision of the motion, at the special term, contains the material facts:

“SUTHERLAND, J. This action was commenced by the service of a summons and complaint on the defendants Sherman &

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Dean, personally, and upon the president and one of the directors of the Hoffman Steam Coal Company, in the city of New York. The plaintiffs and the defendants (the Hoffman company) are both foreign corporations, organized under the laws of, and in, the state of Maryland. Since the commencement of the action, S. Brook Postly has been made a party defendant by supplemental complaint. The defendants Sherman, Dean and Postly are, and were, when the action was commenced, all residents of the state of New York; and Postly was, and is, the president of the Hoffman company. No attachment was issued in the action when the same was commenced, or has been since.

The Hoffman company has not appeared generally in the action, or answered or demurred, but appears specially for the mere purpose of making this motion. The motion is on the part of the Hoffman company, for an order setting aside the summons, complaint and all subsequent proceedings in the action, on the grounds, 1st. That the Hoffman company has not been lawfully served with the summons or complaint, and has not appeared in the action; 2d. Because the plaintiffs and the Hoffman company are both non-residents of this state, and the cause of action did not arise, and the subject matter of the action is not situate, in this state; 3d. Because the said Hoffman Steam Coal Company has no property within this state. The motion is made on the summons and complaint and an affidavit of the defendant Postly. I do not deem the question of property, in this state, a question of any importance on the motion. If the question of the regularity of the service of the summons, or of the jurisdiction of the court as to the Hoffman company, in this action, depended on the question of property in this state, I could hardly say that it appears from the papers before me, that the Hoffman company had property in this state when the action was commenced, or has had any in the state since. The complaint, which is verified by Mr. Palmer, the vice president and a director of the plaintiffs, alleges, on *information and belief*,

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that the Hoffman company has coal, and credits for the proceeds of coal, and property, in the city of New York. The defendant Postly, in his affidavit, states that he is, and has been since its organization, the president of the Hoffman company, and has been, and is, well acquainted with all its business affairs and transactions and its property, and the situation thereof, and that to his knowledge or belief, the said company has not, and had not, when the summons and complaint in this action were delivered to him, any property or coal, or credits for the proceeds of coal, in this state. In reply to this, the affidavit of Mr. Palmer, read on the motion by the plaintiffs, states facts and circumstances merely, which would make it probable that the Hoffman company had, or has, property or coal in New York, or that the Hoffman company are or have been working its mines in Maryland, and transporting coal therefrom, destined for New York, &c. But, as I have said, I do not think the question of property in New York of the least importance on this motion. By section 134 of the code, in a suit against a corporation, the summons shall be served by delivering a copy thereof to the president, or other head of the corporation, secretary, treasurer or cashier, a director or managing agent thereof; but by this section, such service can be made, in respect to a *foreign* corporation, only when it has property within this state, or *the cause of action* arose therein. By section 427 of the code, an action against a foreign corporation may be brought in the supreme court, the superior court of the city of New York, or the court of common pleas for the city and county of New York: 1st. By a resident of this state, for any cause of action; 2d. By a plaintiff, not a resident of this state, when the cause of action shall have arisen, or the subject of the action shall be situated within this state.

In an action against a foreign corporation, the regularity of the service under section 134, and whether the court in which the action was brought has jurisdiction of the cause or subject matter of the action under section 427, are both juris-

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dictional questions, without a voluntary appearance on the part of the defendant. In such an action the court must not only have jurisdiction of the cause or subject of the action under section 427, but the service must be on an officer or agent of the foreign corporation, according to section 134, and in a case in which such service is allowed by that section. The code has done away with the theory and practice of formally entering the defendant's appearance for him, but proof of service of the summons in the manner prescribed by the code, substituted for such appearance, is necessary, without voluntary appearance, to give the court jurisdiction.

By the act passed April 10th, 1855, foreign corporations doing business in this state are required, within a certain number of days, to designate some one, in each county where such corporation transacts business, on whom process may be served, and to file such designation in the office of the secretary of state. By the act, in all cases where such designation shall not be made, and such foreign corporation cannot be served with such process, according to the then provisions of law, it shall be lawful to serve such process on any person found in this state acting as the agent of such corporation, or doing business for them. The act declares that a summons shall be held to be a process, &c.

It is presumed that this act does not extend or enlarge the jurisdiction of this court as to actions against foreign corporations, under sections 134 and 437 of the code. It was intended, evidently, merely to increase the facilities for serving summonses, &c. against foreign corporations, in the cases allowed by section 134, and of which the court has jurisdiction by section 427.

The summons and complaint in this case were served on Postly as the president of the Hoffman company, and on one of its directors in the city of New York. As it respects the person or officer on whom service was to be made, the service was regular, in this case, under section 134. I do not see

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that the act of 1855 in any way affects the question of regularity of service, or of jurisdiction, in this case.

The service of the summons in this case was regular, and allowed by section 134. If the Hoffman company had property in this state, or the cause of action arose therein, although the plaintiff is a foreign corporation, section 134 makes no distinction between actions by resident and actions by non-resident plaintiffs. But by section 427, the plaintiff being a foreign corporation, this court has no jurisdiction over this action, as to the Hoffman company, also a foreign corporation, unless the cause of action arose in this state, or the subject of the action is situated within this state. Both being foreign corporations, it follows from these two sections of the code, that the court has no jurisdiction in this case, as to the Hoffman company, unless the cause of action as to it arose in this state, or the subject matter of the action is situated therein, although the Hoffman company had property in this state at the time of the commencement of the action ; but that the court has jurisdiction, if the cause of action arose in this state, although the Hoffman company had no property in this state at the time of the commencement of the action. If the cause of action arose in this state, the question of property in this state is not a jurisdictional question, under either section 134 or section 427 of the code, whether the plaintiff be a resident or non-resident of the state. What is said in *Hulbert v. Hope Mutual Insurance Company*, (4 *How. Pr. R.* 275 ;) *Brewster v. Michigan Central Rail Road Company*, (5 *id.* 183 ;) *Bates v. New Orleans, Jackson and Great North Rail Road Company*, (13 *id.* 415 ; *S. C.* 4 *Abbott's Pr. R.* 72,) as to an action against a foreign corporation, being merely an action or proceeding against its property in this state, and the judgment in such action a judgment merely *in rem*, was not called for by those cases, and would, it appears to me, be very apt to mislead. A much more correct view of these actions against foreign corporations, and of the provisions of the code relative thereto, was, I think, taken by Judge Hand in

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the *Bank of Commerce v. The Rutland and Washington Rail Road Company*, (10 How. Pr. R. 1.)

I see no reason why private foreign corporations should not be sued in the courts of this state, as well as non-resident natural persons ; or why a judgment obtained against a foreign corporation by service of summons under section 134 of the code, or by publication under section 135, in an action of which the court has jurisdiction by section 427, should not have the same force and effect as a judgment against a non-resident natural person or individual. The code makes no distinction as to the manner and effect of entering a judgment in the two cases.

If the action against a foreign corporation is for the recovery of money, the plaintiff, by section 227 of the code, may, at the time of issuing the summons, or *at any time afterwards*, have the property of the defendant in this state attached ; but there is nothing in the code which makes the issuing the attachment, or the fact of there being property of the defendant in the state, jurisdictional facts, if the cause of action arose in the state. If the cause of action did not arise in this state, and the plaintiff is a resident of this state, the regularity of the service of the summons, under section 134, or of publication, under section 135, depends on the question of property in this state ; and so far, and in such case, the question of property in this state may be a jurisdictional question.

It is true, in one sense, all judgments against corporations, are judgments *in rem*. They cannot very well be judgments *in personam* ; for corporations have no persons. They are immaterial creatures of the law, and all their rights and liabilities come from law. They have no natural rights, for nature never made a corporation. Judgments against them can only affect their property or chartered rights. Judgments obtained in the courts of this state cannot directly reach persons or property in other states ; but why should not the property of a foreign corporation, brought into this state, be

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seized by execution, as well as by attachment? And why should not a party have a right to obtain a judgment against a foreign corporation, in anticipation of property of the corporation coming into this state? Judgments obtained in the courts of this state can only operate directly on persons or things within the jurisdiction of the state; but so far as it respects the force and effect of such judgments *within this state*, the mode or manner of obtaining such judgments; upon what previous service or notice to the defendant or defendants they may be obtained; the regularity of the proceedings to obtain them, and their regularity when obtained, are all questions for the authorities and courts of this state. When sought to be used out of this state, in other states, as evidences of debt, or otherwise, their force and effect depends upon the constitution of the United States, and comity of those states; and their courts have a right to adjudicate upon their force and effect under the constitution of the United States and their state regulations. (*See Moulin v. Insurance Company*, 4 Zab. 223.)

Sufficient has been said, I think, to show that the only question in this case, on this motion, is whether the plaintiffs' cause of action as to the Hoffman company arose within this state. I do not say any thing on the subject of the action as distinguished from the cause of action, (if it be distinguished,) for in examining the question as to where the cause of action arose, it will be perfectly evident that, as distinguished from the cause of action, the subject of the suit is in Maryland; or, at all events, that if any part of the subject of the action as to the Hoffman company is in New York, the cause of action, as to that part of the subject of the action, arose in New York.

What, then, is the plaintiffs' case, and where did the cause of action as to it arise? The complaint alleges that the plaintiffs were possessed of certain lands and of a rail road interest in Maryland; that the defendant Sherman was one of the directors of the plaintiffs; that while such director he

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fraudulently procured from the plaintiffs, to himself and the defendant Dean, a deed of a certain portion of these coal lands, (the complaint stating various facts and circumstances to show the fraud,) and that he also fraudulently procured the execution by the plaintiffs, to and with himself and Dean, of a certain contract for the transportation of coals which might be taken from the coal lands so conveyed to Sherman and Dean, over the rail road of the plaintiffs; that the purchase of coal lands by Sherman and Dean was made without the payment of any money, and that the rates of freight specified in the contract for the transportation of coals were not sufficient to indemnify the plaintiffs against the actual cost of transportation; that Sherman was enabled to and did accomplish his purposes of fraud, by fraudulent collusion with the president, by misrepresentations to the directors, and by an abuse of the trusts confided in him as a director of the plaintiffs, and as chairman of a committee, appointed at his instigation, to negotiate for the sale of the lands in question; that the deed and transportation contract were executed in New York city, where the board of directors of the plaintiffs met, and all the frauds were committed there; that afterwards Sherman, Postly, and certain persons of Baltimore, Maryland, organized, under the laws of Maryland, the incorporation, by the name of "The Hoffman Steam Coal Company of Alleghany," which is made a defendant in this action; that Sherman and Postly are two of the five directors of that company, the other three being residents of Baltimore; that on or about the 20th of August, 1858, Sherman and Dean executed and delivered to the said Hoffman company a deed of the lands so conveyed to the plaintiffs, and have assigned, or are about to assign, to the Hoffman company, the transportation contract made with them by the plaintiffs; that the Hoffman company had full notice, before the conveyance and assignment to them, of all the frauds by which the deed and transportation contract to and with Sherman and Dean had been procured of the plaintiffs; that Sherman and Dean mined and took

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from the lands so conveyed to them about 21,000 tons before May 1st, 1857, and about 26,000 tons between that time and May 1st, 1858, and about 32,000 tons between May 1st, 1858, and August 1st, 1858 ; and since the last mentioned day have taken, directly or through the Hoffman company, about 15,000 tons, and that the Hoffman company are continually removing coals from the land, and converting the same to their own benefit.

The original complaint alleges that all the deeds and papers, the deed to Sherman and Dean, the deed to the Hoffman company, the transportation contract, and the assignment thereof, are in the possession, custody and control of Sherman. The supplemental complaint, making Postly a party defendant, alleges that he, as president, is entitled to the possession of these papers, and that he has the possession or custody of the transportation contract, and of an assignment thereof, or contract in relation thereto, by Sherman and Dean, under which the Hoffman company claim the right, and have exercised and are exercising the right, to transport coals under and by virtue of the transportation contract. It appears from a certified copy of the deed to the Hoffman company, taken from the land records of Alleghany county, Maryland, that the deed is dated August 20th, 1858, was acknowledged before a justice of the peace in Baltimore the same day, and was recorded on the 21st day of August, 1858, at the request of the Hoffman company. There are other allegations in the complaint, charging Sherman with various misapplications and appropriations of the plaintiffs' funds to his own use, and calling upon him to account for the same, which I would not undertake to say would have any bearing on the cause of action against the Hoffman company, if the coal lands were in this state and all the parties resident of this state. It also appears from the deed to the Hoffman company, and the complaint alleges, that the consideration of the deed was the issuing to Sherman and Dean of certificates for a large number of shares of the Hoffman company stock ; and

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the complaint alleges that Sherman, Dean and Postly are the holders of said stock. The complaint asks for a temporary injunction restraining Sherman, Dean and the Hoffman company, and each of them, from selling, or conveying, or encumbering the lands ; from mining or taking any coal therefrom ; from carrying away, selling, or transporting any coal, the product of the mines ; and from in any manner using or interfering with the said lands, or with the coal or other product thereof ; and from assigning or parting with the transportation contract or rights under the same ; and from instituting any action or proceedings in any court, for the purpose of enforcing the said contract, or any rights claimed under the same. As final relief, the complaint asks that the transportation contract, and all assignments thereof, or of any rights under it, to the Hoffman company by Sherman and Dean, be adjudged fraudulent and void, and be decreed to be delivered up to be canceled ; and that the sale and deed to Sherman and Dean by plaintiffs, and the deed by Sherman and Dean to the Hoffman company, be adjudged to be fraudulent ; and that a reconveyance thereof by the Hoffman company be decreed ; and that the defendants, and each of them, be decreed to account for the coal they have taken from the lands, and the proceeds which they have respectively received, and to pay the same, as well as other rents and profits of the premises, to the plaintiffs. The original complaint also asks that Sherman and Dean, and the supplemental complaint that Postly, be decreed to assign and deliver to the plaintiffs all the shares of stock in the Hoffman company which they have received, hold, or are entitled to, and all rights and interests in the said stock or company which they have acquired, as the consideration in whole or in part of the said lands.

Now, what is the cause of action in this complaint against the Hoffman company ? When and where did it arise ? And can this court give the plaintiffs the relief asked for as against that company ?

The complaint implies a wrong—a breach of duty—done

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or suffered by the Hoffman company, to the injury of the plaintiffs, for which the relief asked, if obtained, will be a remedy. The cause of action is the right to that remedy, and that right accrued, and the cause of action arose, when and where the wrong or breach of duty was done or suffered. For one to claim and exercise rights of ownership and profit under a deed or instrument fraudulently procured, against the true owner, is a wrong, for which the law gives a remedy; and the grantee of such claimant, with a knowledge of the fraud, who claims and exercises the like acts of ownership and profits against the true owner, also commits a wrong. It is his duty to give up the property, and all his claims, to the true owner. But such wrong is committed and such breach of duty suffered, when and where the claim is wrongfully made, and the rights of ownership are wrongfully exercised against the real owner.

In this case it appears that the deed to the Hoffman company was executed in Maryland, was acknowledged and recorded there, the land is there, and all claims of ownership and acts of ownership and profits by the Hoffman steam company under it, or the transportation contract stated in the complaint, were and must have been made and exercised in Maryland. The Hoffman company is a corporation of that state. It is plain, I think, that the plaintiffs' cause or causes of action as to the Hoffman company did arise, and must have arisen, in that state. Unless the deed of the Hoffman company is fraudulent and void, and judicially declared to be so, the plaintiffs are not entitled to an account from the Hoffman company for the rents and profits and proceeds of the coal lands. The latter claim is dependent upon the right to have the deed canceled and to a reconveyance.

Unless the cause of action as to the Hoffman company arose in this state, the company cannot be made a party to the action by section 427 of the code; and having no property in this state, it cannot be made a party by a service under section 134, or under the act of 1855; and unless the Hoffman company is a party, how can the court grant the relief asked for against it—that it reconvey the lands, &c.?

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Sherman and Postly are personally within the jurisdiction of the court, and if they or either of them have the possession of the papers asked to be canceled, this court has power, probably, to compel them to deliver up the papers to be canceled; but a decree to that effect, or such cancellation, or a decree as to any other part of the relief asked against the Hoffman company, would not affect it, unless it is made a party to the action. The action as to the Hoffman company proceeds *in rem* against the Hoffman company for real estate in Maryland, for acts and wrongs done and suffered in Maryland in relation thereto, and under the transportation contract. The main relief which the plaintiffs do not ask for in this complaint, but which the plaintiffs require—to wit, restoration of the possession of the real estate—must be had in the courts or through the authorities of Maryland; and it may well be doubted whether much of the relief asked in the complaint against the Hoffman company is not incident to, or can be separated from, an action for such possession. Upon the whole, I think the summons, complaint, and all subsequent proceedings in this action should be set aside as to the Hoffman company. The plaintiffs to have leave to amend the summons and complaint and proceed against the other defendants within the jurisdiction of this court, as they may be advised.

If there were reasonable grounds for doubt on this question of jurisdiction, I should deny the motion, and leave the Hoffman company to raise the question by their motion, as well as by demurrer or answer. All the cases assume such right. In addition to the cases before cited, see *Western Bank v. City Bank of Columbus*, (7 How. Pr. Rep. 238.)'

The following opinion was given on the decision of the appeal, at the general term :

ROOSEVELT, J. This suit, so far as the appeal is concerned, is an attempt to determine, in a court of the state of New York, a controversy between two corporations created by the state of Maryland, and relating to lands in the state of Mary-

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land. Mr. Justice SUTHERLAND, at special term, considering the matter as belonging to another jurisdiction, dismissed the summons and complaint, and sent the parties to the forum to which, as he conceived, they properly belonged. From that decision the plaintiffs have appealed, and although they have presented in support of their positions a very extended and elaborate argument, the question, as it appears to me, requires little more than a brief statement, to dispose of it. As a matter of comity, it is clear that no duty devolves upon this state to entertain jurisdiction of the controversy. Indeed it might well be suggested that to do so, instead of comity, would savor somewhat of impertinent interference. And certainly the courts of this state, especially those in the first district, are not so deficient in business as to make it incumbent on them *ampliare jurisdictionem*. The plaintiffs, as their charter shows, were created a body corporate, not only by the laws of Maryland, but for the purpose of managing a large body of land lying exclusively in the state of Maryland, "containing extensive beds of coal and iron ore." The defendants, The Hoffman Steam Coal Company, organized, it appears, by the same authority and for a like purpose, became the purchasers, by fraud, it is alleged, of part of this land. And the great object of the suit—the only one that need be noticed—is to cancel the transaction and obtain a reconveyance. What, I repeat it, has this court to do with the case?

Foreign corporations, it is true, in some instances, may sue or be sued in our courts. But to warrant the proceeding there must be either a necessity, or a fitness suggested by the peculiar circumstances. The cause of action, or the subject, or at least some property to be acted upon, must have arisen or be situated within our jurisdiction. (*Code*, §§ 427, 134.) Indeed without these qualifications, or one or more of them, the judgment, should the court render it, would be a nullity. It would operate on nothing in the state and be regarded by nobody out of it. Even the domestic origin of the cause of action, although allowed by the code, existing alone, might

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and probably would be disregarded by other states when called upon to give effect to the judgment. We ourselves, in the instance of a Vermont divorce, have so construed the federal constitution, declaring that the decree rendered under such circumstances was not a "judicial act," to which another state was bound "to give full faith and credit."

The object of the present suit is not to obtain a moneyed judgment to be levied on property or debts which may by possibility come within the jurisdiction. In such a case, if the foreign corporation were "doing business in this state," (*Act of 1855*,) there would be no difficulty, as there would be no unfitness, in allowing them to be sued here by the service of a summons "on the person doing business for them." And that is the whole extent of the act referred to. But here the leading object is to annul a conveyance made to the defendants, the Hoffman company, of land in Maryland; a conveyance, too, which was acknowledged in that state and delivered and placed among its recorded titles, several months before this suit was instituted. In other words, the plaintiffs, a Maryland corporation, ask the courts of New York to entertain in effect an ejectment against another Maryland corporation for lands in Maryland; a proposition which needs only to be stated to be refuted. To say, in such a case, that either "the cause of action" or "the subject of action" exists or has arisen in New York; or that the legislature of New York contemplated assuming jurisdiction in such a case, would seem little short of preposterous. As the plaintiffs have waived all objections to the form in which the question is presented, and have agreed that the point involved should be disposed of on its merits, the order appealed from must be affirmed, but without costs.

CLERKE, J., concurred.

DAVIES, J., dissented.

Order affirmed.

[NEW YORK GENERAL TERM, February 7, 1859. *Roosevelt, Davies and Clarke*, Justices.]

## ROBERTS vs. SYKES.

Where stock is pledged as security for the payment of a note, the pledgor's equitable action to redeem the stock accrues or commences when the note becomes due; and if such action is not brought within ten years from that time, it will be barred by the statute of limitations.

Such a case comes within the section of the revised statutes relative to bills for relief, in cases of trusts not cognizable at law, &c. (2 *R. S.* 801, § 52.) The court will not, for the purpose of relieving a pledgor from the statute of limitations, assume, in the absence of any allegation or proof on the subject, that there was an agreement between the parties, that the pledgee should keep the stock until he should have repaid himself out of the dividends and proceeds.

The legal remedy of a pledgor, by trover or otherwise, is limited to six years after the maturity of the note, for the payment of which the property is pledged, *it seems*.

THIS was an equitable action, brought by a pledgor against the personal representatives of the pledgee, for the redemption and reassignment of the stock, and for an account of the receipts and disbursements of the pledgee while the holder of the stock. The defense set up in the answer was the statute of limitations. The trial was by the court.

*T. Burrall*, for the plaintiff.

*F. B. Tillou*, for the defendants.

SUTHERLAND, J. The plaintiff, on or about the 3d day of April, 1840, gave his note to John B. Desdoity for \$500, with interest, payable at six months, and at or about the time of the making and delivery of said note transferred to Desdoity absolutely, in terms, on the books of the company, twenty shares of the capital stock of the Manhattan Gas Light Company; and at the same time Desdoity gave the plaintiff a receipt for the twenty shares of stock, stating that the same was received as collateral security for the payment of the note, and containing an express promise on the part of Desdoity to transfer the shares of stock to the plaintiff,

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on payment of the note. The plaintiff did not pay the note when it became due, nor ask for a re-transfer of the stock, and Desdoity retained it. When the stock was transferred to Desdoity, only \$27 per share had been paid on it, and it was subject to a call of \$23 per share, on the payment of which it would be full stock. This call was made on Desdoity, as the holder of the stock, and he paid the \$23 per share, making \$460. Subsequently there were, from time to time, three several increases of the stock, or additional stock declared and distributed among the holders of the original scrip; so that each stockholder, at each increase, received as many shares as he then held. Desdoity, as the holder of the twenty shares of original stock, took this increase or additional stock, and after having, in 1854, transferred to third parties forty shares thereof, had, in 1855, at the time of his death, forty shares of stock. The first increase was in 1847, the second in 1852, and the third in 1855. Desdoity never had any stock in the company, which did not grow out of the stock so transferred to him by the plaintiff. He from time to time received dividends upon the stock, and from time to time paid various sums, for calls, and on account of the new scrip.

It sufficiently appears from the proofs that after deducting the \$500 note of the plaintiff, and the interest, there would have been, at the time of Desdoity's death, in November, 1855, a considerable balance in his hands, over and above the disbursements and payments made by him on account of the stock.

There is no allegation in the complaint, nor is there any evidence, that the plaintiff ever paid, or offered to pay, the note, or demanded the note or a transfer of the stock, otherwise than that it is alleged in the complaint that on or before the 1st of July, 1852, Desdoity had received, in dividends on the stock and from sales of portions thereof, over and above what he had paid for installments or calls, more than sufficient to pay the \$500 and the interest thereon; and

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otherwise than the demand in this action for a transfer of so much of the stock as Desdoity held at the time of his death.

It is not alleged, nor does it appear, that the plaintiff ever, at any time, interfered with, or objected to, Desdoity's disposition of the stock or his receipt of the dividends; or ever called upon him to account for the stock, or the proceeds, or income thereof; or that he has ever, since the \$500 note became due, claimed the stock, or the results or proceeds thereof, otherwise than by this action.

These are the material facts of this case, as they appear from the pleadings and proofs before me. The plaintiff asks that an account be taken and stated of the receipts and disbursements of Desdoity in his lifetime, as the holder of the twenty shares of stock; and that so much of the stock as he held at the time of his death, be reassigned to the plaintiff by the defendants, his personal representatives; and that the balance of moneys found in their hands, with interest, be paid to the plaintiff. The defendants, in their answer, setting up and insisting upon the statute of limitations in bar of the plaintiff's right to bring the action, the question is, shall there be a reference to take and state the account, as asked for by the plaintiff? Or is the statute of limitations a complete bar to the plaintiff's right of action?

After giving this question a careful examination, I cannot see why the statute of limitations is not a complete bar to the plaintiff's right of action. The note for \$500, the receipt of Desdoity, and the transfer of the stock on the books of the company, may be considered but as parts of one instrument or transaction, and taken together, as showing the intent of the parties, and the legal effect and operation of the arrangement. So considered, they show that the stock was transferred to Desdoity as a pledge, and not by way of mortgage. (*McLean v. Walker*, 10 John. 472. *Cortelyou v. Lansing*, 2 Cai. 200.)

The time for the redemption of the pledge was fixed by the contract between the parties. The note was payable six months

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after date, and the stock was pledged for the payment of the note. The express promise of Desdoity, in his receipt, to re-transfer the shares of stock to the plaintiff on payment of the note, is precisely such a promise or duty as the law would have implied from the fact of the pledge, had the receipt contained no such express promise; and it, therefore, does not affect the transaction, or the rights of the parties. The absolute transfer of the stock, on the books of the company, is qualified by the receipt, and did not prevent such transfer operating as a pledge between the parties.

The stock, then, having been transferred to Desdoity as a pledge for the payment of the note, what were the rights of the respective parties? The transfer, as a pledge, did not transfer the plaintiff's general right of property in the stock; but the same remained his, after the transfer, subject to Desdoity's right of possession until the note was paid, and other special rights as pledgee. When the note became due, the plaintiff had a right to redeem the stock by paying the note; and upon paying or tendering the amount due on the note, if Desdoity refused to re-transfer the stock, the plaintiff had a right, by bill in chancery, to enforce such transfer. Had the thing pledged been an ordinary chattel, a watch or horse, the plaintiff would also have had a remedy at law, by an action of trover or replevin; and perhaps he would have had a remedy at law in this case; but it is not necessary to inquire as to that. It is sufficient in this case, to say and admit, that the pledgor had a right in all cases to redeem his pledge by bill in equity, on paying or tendering the debt for which the thing was pledged; and that to give him this right of redemption he was not obliged to pay or tender the debt on the precise day, or at the precise time fixed for the redemption of the pledge, *but could do it afterwards*.

As the pledgor had this right to redeem by bill in equity, so the pledgee, his debt not being paid, had a right by bill in equity to foreclose the pledgor's right of redemption, or to sell the pledge at public auction, giving the pledgor notice of the

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time and place of sale, and thus get his money, and cut off the pledgor's right of property and of redemption. (*Cortel-you v. Lansing*, 2 *Cai. Cas. in Er.* 200. 2 *Kent's Com.* 582, 5th ed. 4 *id.* 138. *Brownell v. Hawkins*, 4 *Barb.* 491.) The pledgee could also, without resorting to his pledge or collateral, bring an action at once, for his debt.

These were the legal rights of the parties to this transaction when and after the note became due, and were the legal rights of them or their representatives when this action was commenced, except so far as barred or taken away by the statute of limitations. But the parties did not choose to exercise any of these rights as pledgor or pledgee. The plaintiff never paid, or offered to pay, the note, and never demanded a re-transfer of the stock; and Desdoity or his representatives have never given the plaintiff notice to redeem the stock, or of a sale of the same, or undertaken to foreclose the plaintiff's right of redemption. The plaintiff kept, and has, Desdoity's receipt, and Desdoity in his lifetime kept, and his representatives have, the plaintiff's note; and it does not appear that a word has ever passed between the parties about the stock, or its re-transfer, or the payment of the note, or the rights of the parties under or growing out of the original transaction, since the transfer of the stock to Desdoity, and the execution of the receipt, by him, to the plaintiff.

We must presume, I think, that the parties intended to let the statute of limitations settle their rights; or, that, in fact, they settled them themselves, as might be inferred from their mutual acquiescence and silence. I think the statute of limitations has so settled their rights that the stock and its proceeds are left in the hands of Desdoity's representatives, without any remedy or right of action on the part of the plaintiff.

As to the plaintiff's *legal* remedy by trover or otherwise, if he had any, I think it was limited to six years after the maturity of the note; but if he had a right to pay the note,

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and demanded a re-transfer of the stock at any time within six years after the statute of limitations had attached on the note, it was barred long before this action was commenced; the note falling due the 9th of October, 1840, and this action having been commenced on the 16th of December, 1856.

As to the plaintiff's right of redemption by bill in equity, it is unnecessary to inquire whether there was any limitation, or what was the limitation of such right, at common law, or before the revised statutes. It is sufficient to say, that by section 52 of article 6 of the title of the revised statutes, relating to the time of commencing actions, (2 R. S. 301,) "bills for relief in case of the existence of a trust not cognizable by the courts of law, and in other cases not herein provided for, shall be filed within ten years after the cause thereof shall accrue, *and not after*." This action would fall within the latter clause of that section. (*Caulkins v. Caulkins*, 3 Barb. 305.) This section is positive and certain, and even prohibitory. The bill must be filed within ten years after the cause of action accrues, *and not after*. The limitation by section 97 of the code would be the same; but the limitation by the revised statutes applies to this case, because the plaintiff's right of action, if he had one, accrued before the code went into operation. (*Code*, § 73.)

I think the plaintiff's equitable action to redeem his stock accrued or commenced on the 9th of October, 1840, when the note became due, and that the ten years given to him by the statute to file his bill expired on the 9th of October, 1850. But supposing the ten years' limitation did not commence running against his equitable right until the six years' statute of limitation in his favor had attached on his note, which was on the 9th of October, 1846, even then his ten years expired on the 9th of October, 1856, more than two months before the commencement of this action.

In any aspect of the case, it would appear that the plaintiff's equitable right to redeem by action, was barred by the statute.

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The theory of the plaintiff's complaint probably is, that the statute did not commence running against him until Desdoity had received, from dividends and proceeds of the stock, over and above what he had paid for calls or installments thereon, sufficient to pay the note and interest. If this were so, we could not say whether the statute of limitations had attached or not, until an account is taken of the receipts and disbursements of Desdoity and his representatives, on account of the stock.

This view of the question assumes a new arrangement or agreement between the parties, by which Desdoity was to keep the stock until he paid himself out of the dividends and proceeds; but such new agreement is neither alleged in the complaint nor proved; and I do not feel authorized to presume it, from the facts in this case, for the purpose of relieving the plaintiff from the statute of limitations. And besides, perhaps such a presumption would not be any more consistent with, or follow from, such facts, than a presumption that at the time, or soon after, the note became due, the parties mutually agreed that Desdoity should keep the stock as his own, to pay the note, the value of the stock then being about the amount of the note, and being liable to the call for \$460 to make it full.

But I feel obliged to decline making any presumptions in this case, and to decide against the plaintiff's right of action, on the ground of the statute of limitations, alone.

The defendants must have judgment, with costs.

[NEW YORK SPECIAL TERM, April 4, 1859. *Sutherland*, Justice.]

BORST *vs.* BALDWIN.

Where a person takes an assignment of a judgment, with notice of a stipulation entered into by his assignor, the plaintiff in the judgment, relative to the method of enforcing it, he cannot maintain an action to have the stipulation vacated on the ground that his assignor was induced to enter into it by the fraud of the other parties to it.

The assignment of the judgment is an affirmance thereof, but will not carry with it a right of action for the fraud; nor is such right of action susceptible of assignment, so as to authorize the assignee to sue in his own name.

**D**EMURRER to the complaint, on the ground that it did not set forth facts sufficient to constitute a cause of action.

*L. H. Van Schatck*, for the plaintiff.

*Wm. B. Leeds*, for the defendant.

SUTHERLAND, J. The plaintiff had a claim, arising on contract, against the defendant George D. Baldwin and one William H. Adams, who were copartners under the firm name of Adams & Baldwin, as bank note engravers, for \$3000, and which claim the plaintiff assigned to one John C. Ansman. Ansman, as assignee, brought an action in this court, on the claim against Adams & Baldwin; and issue being joined therein, the action was noticed for trial at the circuit. Baldwin proposed to the plaintiff, acting, as alleged, as the agent of Ansman in the management of the action, and in relation to the subject matter thereof, a settlement of the suit; and it was settled, by judgment being permitted to be entered up against the defendants in the action, for \$1361.21, in pursuance of and upon the terms and conditions of a written agreement entered into between the parties. By this agreement Ansman stipulated to enforce the collection of the judgment out of the separate property of Adams, and not out of the property of Baldwin, and to use all lawful means, by execution and supplemental proceedings, to enforce the collection of the judgment out of the property of Adams; and Baldwin

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agreed to pay Ansman, in bank note engraving and printing, on demand, a sum not exceeding \$680.62, or any deficiency less than that sum, which could not be collected out of Adams; and on payment of such deficiency, not exceeding \$680.62, Baldwin was to be released from the judgment.

The complaint in this case, after alleging substantially these facts, alleges that this settlement, and the agreement under which the judgment was entered, were brought about by the fraud of Baldwin; setting out the facts and circumstances, and the alleged false representations of Baldwin, to show the fraud; that Adams was insolvent, and Baldwin knew it; that nothing had been or could be collected of Adams, although execution had been issued on the judgment, and supplemental proceedings instituted against him; that Baldwin's fraud was first discovered by Ansman and the plaintiff when the execution was issued; that Baldwin was and is responsible, and the claim could have been, and could now be, collected of him; that before the commencement of the action, the said "Anzman, for a valuable consideration, *sold, assigned and transferred the said judgment*" against Adams & Baldwin to the plaintiff; and that the said Adams & Baldwin are indebted to the plaintiff, on the judgment, in the sum of \$1465.01, with interest thereon from November 28, 1856. On these facts the plaintiff asks, in his complaint, that the said *stipulation or agreement* may be set aside and declared null and void, and for such other relief as the court may think proper to grant. The defendant demurs, on the ground that the complaint does not state facts sufficient to constitute a cause of action.

The question, and the only question raised by the demurrer, is, whether the *plaintiff, as the assignee of the judgment merely*, conceding Ansman's right, on the discovery of the fraud, to bring this action, and ask for the relief sought by the plaintiff, can bring the action, or has any right to such relief.

Anzman, on his discovery of the fraud, could have consid-

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ered the judgment void or voidable, and could have instituted an action, or proceedings, to set aside the stipulation and judgment, and have them declared void on the ground of the fraud; or he could affirm the judgment and stipulation, and hold Baldwin personally responsible, in an action for the deceit or fraud.

Ansman's assignment of the judgment to the plaintiff was an affirmance of the judgment by Ansman, and may have left in him the action or right of action against Baldwin, for the fraud; but the assignment of the judgment could not carry with it this right of action for the fraud; nor was it susceptible of assignment, so as to give the assignee a right of action in his own name. (*Zabriskie v. Smith*, 3 Kern. 322.)

The plaintiff took the judgment with knowledge of the stipulation restricting its operation, and must be presumed to have taken it subject to the stipulation, and in fact to have taken the stipulation as part of the judgment; and it would be very extraordinary if it could be presumed that the plaintiff took, under the assignment of the judgment, a right at the same time, and by the same assignment, to attack and repudiate the judgment.

In my opinion the complaint shows no cause of action in the plaintiff; and the defendant must have judgment on the demurrer, with costs.

[NEW YORK SPECIAL TERM, April 4, 1859. *Sutherland*, Justice.]

FORD *vs.* SAMPSON.

An answer, in an action to recover the possession of real estate, which denies that the defendant is in possession of the premises described in the complaint, or that there has been any demand of the possession, by the plaintiff, or any unlawful withholding thereof, does not put in issue the title of the plaintiff, or raise the question of adverse possession.

If the defendant designs to question the validity and force of the deed, under which the plaintiff claims, to pass the title to the lands in dispute while a stranger was in possession claiming title, he should frame his answer accordingly, and set up a title in himself, or title out of the plaintiff.

**T**HIS was a motion to turn a verdict for the defendant into a verdict for the plaintiff. The action was brought to recover the possession of real estate in Brooklyn. The defendant, in his answer, denied that he was in possession of a portion of the premises as bounded and described in the complaint. He also denied that any demand of possession had been made, by the plaintiff; or that there had been any unlawful withholding; but the answer contained no denial of the plaintiff's seisin or right of possession.

On the trial the judge directed the jury to find a verdict for the defendant, with leave to the plaintiff to apply to the court, at a general term, to turn the same into a verdict for the plaintiff for a strip of land on the southerly side of the plaintiff's lot, four inches in width at the rear of the lot, and twenty-two feet six inches in length.

*Gordon L. Ford*, plaintiff, in person.

*A. Lott and P. S. Crooke*, for the defendant.

*By the Court*, BROWN, J. The parties to this action are owners of separate lots of ground adjoining and upon the west side of Columbia street in the city of Brooklyn, and this action is brought to recover a small gore of land, six inches wide in the rear, and running out to a point thirty-five feet easterly from the rear of the lots, and which the plaintiff claims is in-

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cluded within the lines of his lot, and is now in the possession of the defendant. The proof shows that the gore of land in controversy is within the defendant's inclosure, and on his side of the division fence. George S. Howland owned both of the lots in 1841, and is the common source of title. He conveyed the plaintiff's lot to Wildes Thomas Thompson, by deed dated June 21, 1842, who conveyed to William S. Wetmore by deed dated September 7, 1848. William S. Wetmore conveyed to the plaintiff by deed bearing date April 19, 1856. The title deeds of the defendant were not produced upon the trial, so that we do not see precisely when he or his grantors, mediate or immediate, entered into the possession. If the question of adverse possession arose in the case, as the counsel for the defendant supposed, upon the argument, this fact would have been important; but in the view I shall take of the case, it cannot be of any consequence.

The complaint sets out the plaintiff's seisin in fee simple of the entire lot upon the westerly side of Columbia street, describing it by the same metes and bounds as those contained in the several deeds of conveyance to which I have referred; and then alleges that the defendant is in possession of a portion of the lot, being the gore in controversy, which is also described by metes and bounds. It also alleges that possession of the gore or small lot has been demanded of the defendant, and that he refused and still refuses to deliver up the same to the plaintiff. To these distinct and specific allegations the defendant answers that he denies that he was in possession of the premises claimed and described in the complaint. He also denies the demand of the possession, and the unlawful withholding thereof.

The title of the plaintiff is not put in issue by the pleadings, for nothing is controverted by the answer but the defendant's possession, the plaintiff's demand of the possession, and the unlawful withholding thereof by the defendant. No question of adverse possession arises in the case; for if it was the design of the defendant to put in question the validity and

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force of the plaintiff's deed, to pass the title to the lands in dispute while a stranger was in possession claiming the title, he should have framed his answer accordingly, and set up the title in himself, or title out of the plaintiff, and thus the title would have been put in issue.

Both the surveyors concur that the plaintiff's deed covers the premises in dispute, and the letter of the plaintiff of the date of the 1st July, 1858, and the defendant's reply thereto, proves that the possession was demanded and refused.

Judgment should be entered that the plaintiff recover from the defendant the premises described in the complaint, with costs.

Judgment accordingly.

[DUTCHESS GENERAL TERM, May 14, 1859. *Lott, Emott, Brown and Davies*, Justices.]

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### WINNEBRENNER vs. EDGERTON.

A motion to set aside a judgment entered upon confession, on account of the defectiveness of the statement, is not founded upon an irregularity, so as to require the moving party to specify in his motion papers the grounds of the motion.

Defects of that nature are not mere irregularities. They are matters of substance, and if established, render the judgment void.

Requisites of the statement of indebtedness, upon which a judgment by confession is to be entered.

**A** PPEAL from an order made at a special term, denying a motion to vacate a judgment entered on confession, on the ground of the defectiveness of the statement of consideration.

*By the Court*, DAVIES, J. Jones, a subsequent judgment creditor of the plaintiff in this case, moved to set aside this judgment, upon the ground that the statement on which it

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was entered was not in conformity with section 383 of the code. It is a mistake in the counsel for the plaintiff to suppose that this motion is founded on any irregularity in entering up the judgment. If it had been, then it would certainly be necessary for the moving party to specify in the moving papers the grounds of his motion. The defects complained of are not mere irregularities. They are matters of substance, and if established, render the judgment void. (*Von Beck v. Shuman*, 13 *How. Pr. R.* 472. *Dunham v. Waterman*, 6 *Abbott's Pr. R.* 357; *S. C.*, 3 *E. P. Smith's* 17 *N. Y. R.* 9.) In the latter case, the court of appeals held that when the object of the party was only to set aside the previous judgment, the proper method of attaining it was by motion. And the court also held that the judgment, having been confessed without a compliance with the provisions of the code, was to be deemed fraudulent and void as to other judgment creditors of the defendant. The justice at special term held that the first, third and fourth statements of causes of indebtedness were sufficient, and denied the motion to vacate the judgment, so far as it covered them. From that denial an appeal has been taken to this court.

The first cause of indebtedness is stated in these words: "Amount due from the defendant to the plaintiff, for plaintiff's liability and guarantee, now past due, to Richard S. Williams, as president of the Market Bank, city of New York, \$8005.43.

Third. Amount of one promissory note, indorsed by the plaintiff for defendant, due July 10, 1858, and held by C. Dord & Co., \$2220.85.

Fourth. Amount of two promissory notes, indorsed by plaintiff for defendant, one due April 27, 1858, and the other due on the 27th day of June, 1858; both held by the Importers and Traders' Bank of the city of New York, for the sum of \$5508.86."

Subdivision 2 of section 383 of the code declares, that if the judgment be confessed for money due, or to become due,

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the statement in writing required must state concisely the facts out of which it (the money due, or to become due,) arose, and must show that the sum confessed therefor is justly due, or to become due. And the third subdivision of that section declares, that if it (the judgment) be for the purpose of securing the plaintiff against a contingent liability, it (the statement) must show concisely the facts constituting the liability, and must show that the sum confessed therefor does not exceed the same.

The court of appeals, in *Chappel v. Chappel*, (2 Kern. 215.) in considering a judgment confessed under the second subdivision of this section, hold that the creditors are entitled to the facts out of which the indebtedness arose; that the statute looks not to the evidence of the demand, but to the facts in which it originated; in other words, to the consideration which sustains the promise. The rule laid down in this case has been followed in *Purdy v. Upton*, (10 How. Pr. R. 494;) *Boyden v. Johnson*, (11 id. 503;) *Von Beck v. Shuman*, (13 id. 472;) *Kendall v. Hodgins*, (7 Abbott's Pr. R. 309;) *Dunham v. Waterman*, (6 id. 357; S. C., 3 E. P. Smith's 17 N. Y. R. 9.) All these cases, except the one in 11 Howard, are confessions of judgments under subdivision 2 of section 383 of the code.

But the code requires that if the judgment be given to secure the plaintiff against a contingent liability, the statement required must state concisely the facts constituting the liability; using precisely the same language as in subdivision 2 of the same section. Now it cannot be contended that these statements show the facts constituting the liability of the plaintiff to pay the several sums mentioned therein. In statement first, no particulars of the defendant's indebtedness are stated to show whether, in truth, he owed the plaintiff any thing, or of the liability or guaranty therein referred to. It is not stated for whom the liability was given, or upon what consideration. No particulars of the guaranty are

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given; no statement showing how or why the plaintiff is bound to pay any thing on such liability or guaranty.

So, in regard to the promissory notes in statements three and four, the facts in regard to them are not only not concisely stated, but are not stated at all. It does not appear whose notes they are, or that the liability of the plaintiff on them is a liability incurred on behalf of the defendant, and one which he is under any legal obligation to protect. No consideration for the promise of the defendant to pay the amount of these notes is shown. It is said they are notes indorsed for the defendant, by the plaintiff, but whose notes is not stated, or how indorsed, or why, for the defendant. In *Boyden v. Johnson*, (cited *supra*,) Strong, J., said: "The statement in question, (in that case,) so far as relates to future sales, is objectionable, not only on account of its indefiniteness, but as no facts are stated showing any obligation to sell any goods at any future period. If a judgment by confession can be allowed to have any future indebtedness, it should be particularly specified, and it should be called for by some existing liability. The code is explicit, that when the object is to secure the plaintiff against a contingent liability, there must be a statement of the facts constituting the liability."

In the present case there is no statement of any facts showing the liability of this plaintiff to the defendant to pay these several notes, nor any fact stated, showing the liability of the defendant to repay the same to the plaintiff. For aught that appears in these statements, the liability of the plaintiff may have been incurred for some other person than the defendant. I have no doubt that the statements are defective, and the order appealed from, holding them sufficient, is erroneous, and should be reversed.

Order reversed.

[NEW YORK GENERAL TERM, May 2, 1859. *Roosevelt, Davies and Clarke, Justices.*]

VAN SCHAICK *vs.* THIRD AVENUE RAIL ROAD COMPANY.

The plaintiff executed a lease of premises to V. as the agent or trustee of an association, of which the defendant, a corporation, was the successor. The association transferred all its property to the corporation, and caused the lease to be assigned to the corporation, and the latter covenanted to do and perform all things which the association were bound to do. *Held* that the plaintiff could maintain an action against the defendant, upon the covenant for payment of rent, in the lease; and that he could recover thereon, for rent during the whole term.

**A**CTION by the plaintiff, Myndert Van Schaick, for the recovery of rent which had accrued upon a lease executed by him to one Henry Van Schaick, and which lease had been transferred by the latter to the defendants.

DAVIES, J. If the defendants can be regarded as standing only in the position of assignees of the lease made by the plaintiff to Henry Van Schaick, then they are not liable to the original lessor, the plaintiff, for rent which has accrued since they ceased to have possession of the demised premises. If they are only assignees of the lease, they are not liable for any breaches of the covenants of the lease since their assignment of the lease to Searles.

The court, in *Carter v. Hammett*, (18 Barb. 608,) held that "the only liability of the assignees at any time was the result of their possession, and was limited in its duration by the operation of that possession. \* \* \* The rule in such cases is—and it is well founded on the principles of justice and implied contracts—that each successive party, other than the original lessee, is liable only by reason of, and for the term of his own possession. Possession is, therefore, both the foundation and the boundary of the liability." Chancellor Walworth, in *Childs v. Clark*, (3 Barb. S. C. R. 60,) says: "It is perfectly well settled, however, that the assignee of a lease is only liable, as such assignee, for the rents which accrued or became payable, or for other covenants broken, while he was such assignee; and that he may discharge himself from all

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further liability by assigning his interest in the premises to a stranger, even if the assignee is a beggar ; provided he actually relinquishes the possession of the premises and all interests therein, so that the assignment is not merely colorable or fraudulent. For as there is no privity of contract between the lessor and the assignee of the lease, the latter is personally liable only in respect to his privity of estate in the land, or in respect to covenants running with the land, for the rents which accrued and became payable after such privity of estate commenced, and before it terminated ; that is, while he enjoyed, or had the right to enjoy, the premises, or some part thereof, as an assignee of the lease." In support of these propositions, he cites *Armstrong v. Wheeler*, (9 Cowen, 88 ; ) *Torry v. Pitcher*, (Carth. 177 ; ) *Likeux v. Nash*, (2 Strange, 1221 ; ) *Taylor v. Shum*, (1 Bos. & Pull. 21.) The cases referred to fully sustain the positions of the chancellor, and the case in *Strange* further holds that it was no fraud in the assignee to assign to a prisoner in the Fleet, to whom he lent five shillings to pay to him the foundation of the assignment. It is clear, therefore, upon the authorities referred to, that if the defendants stand in the character of assignees solely, they are not liable for any rent accrued since their assignment to Searles. But it seems to me that the facts disclose an entirely different case, and by it their liability is to be tested.

The lease was in fact made to Henry Van Schaick, as the agent or trustee of the company of which the defendants are the successors. The original association or company assumed all the covenants of the lease, and the present defendants have taken from the association all its property, with covenants to do and perform all things which the association were bound to do. And immediately upon the execution of such transfer by the association, and to effectuate and carry into effect the grant made by it to the defendants, Henry Van Schaick, the trustee and agent of the association, assigned the lease to the defendants.

The defendants are therefore the true owners of the lease,

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and Van Schaick held it for their benefit. If he had refused to transfer it to them, this court would have compelled him to do so. He did voluntarily what he was under a legal obligation to do, vest the title to the lease in the name of his principals. It cannot be denied that if Henry Van Schaick had been sued for the rent reserved by this lease, or was about being sued therefor, he might maintain his action against these defendants to compel them to relieve him from the position he occupied, as their trustee and surety.

I think, therefore, when the defendants took the assignment of the lease from Van Schaick, on the organization of this company, they but carried out and gave effect to the intention of the parties, that when the company should become legally organized and competent to take title, they were to become the lessees of the premises, and subject to the performance of all the covenants on the part of the lessees. Regarding the transaction in this light, and which I am satisfied is the true aspect in which to regard it, and which is confirmed by the acts of the parties, the case of *Lorillard v. Lorillard* (4 Abbott's Pr. R. 210) is not without significance. In that case it was clearly intimated, that if the original lessee was the mere instrument of the subsequent assignee, and in fact it was not intended that any title should vest in the original lessee, then that the subsequent assignee might be liable to pay the rent, even though he had assigned the lease. These views were expressed upon the principle that the real party in interest should pay the rent, and that when that party was discovered he might be made liable. In this case there can be no controversy that the original association was in fact, though not in name, the true and actual lessee; and it seems to me that the defendants have assumed the same position, and have subjected themselves to the same liabilities.

There can be no doubt that Henry Van Schaick is liable to pay this rent, and standing as he does, in my opinion, as surety for the defendants, his creditor can avail himself of his right

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primarily to call upon the defendants, to pay directly to him, instead of compelling Henry Van Schaick to pay him, and leave him to call upon the defendants for reimbursement.

This rule is clearly laid down in *Curtis v. Tyler*, (9 *Paige*, 432,) and is every day followed in this court. In that case the plaintiffs were held entitled to avail themselves of a security given to the debtor for the payment of the debt owing to them. The chancellor says: "It is well settled, however, that when a surety, or person standing in the situation of a surety for the payment of a debt, receives a security for his indemnity, and to discharge such indebtedness, the principal creditor is in equity entitled to the full benefit of that security. And it makes no difference that such principal debtor did not act upon the credit of such security in the first instance, or even know of its existence."

I therefore hold, that the defendants contracted with the plaintiff through Henry Van Schaick, as their agent or trustee.

1st. That they impliedly as well as expressly agreed to pay the rent, to assume the position of lessees, and to indemnify Henry Van Schaick.

2d. That the contract originally made between the company while unincorporated, and Henry Van Schaick and the plaintiff, was legally and equitably made with the defendants when incorporated, and that they adopted it, and availed themselves of its benefits, &c.

3d. It follows, that taking the benefits resulting from the arrangement, they are also subject to its burdens, certainly to the extent of relieving and indemnifying Henry Van Schaick to the amount of his liability to the plaintiff.

4th. That in equity Henry Van Schaick's right to indemnity is the property of the plaintiff, his creditor, and may be enforced by him.

The plaintiff is therefore entitled to judgment, that the defendants perform with him all the covenants of the lease to be kept and performed by the lessees, and pay the back rent,

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and pay off and discharge all assessments unpaid on the premises since the date of the lease; and that the plaintiff recover his costs to be adjusted, &c.

[NEW YORK SPECIAL TERM, May 2, 1859. *Davis*, Justice.]

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THE PEOPLE *ex rel.* MORTON *vs.* TIEMAN.

Where an individual claims, by action, a public office, or the incidents to the office, he can only recover upon proof of title. The salary and fees of an office are incident to the title, and not to the usurpation and colorable possession of the office.

Possession under color of right, though it may serve as a shield for defense, cannot, as against the public, be converted into a weapon of attack, to secure the fruits of the usurpation and the incidents of the office.

At common law, a public officer, appointed or chosen for a specified term, cannot hold over, beyond that term, upon the failure of the proper body to appoint or elect a successor.

Provision is made by the laws of this state for all the cases in which persons in office can hold over, beyond the times for which they were appointed or chosen. But there is no provision of law authorizing the incumbent of the office of city inspector of New York, to hold over, after the expiration of his term, and until his successor is appointed.

Accordingly, where the relator, prior to the passage of the act of 1857 amending the city charter, was elected to the office of city inspector, for the term of three years, which term was to expire on the 31st of December, 1858; it was *held* that by virtue of the act of 1857, which expressly limited his term of office to the time for which he was elected, and repealed the act under which he took office, the relator's authority as city inspector ceased on the 31st of December, 1858; and that consequently he could not, by mandamus, compel the mayor to countersign the warrant of the comptroller, for his salary, during the months of January and February, 1859. 6

**M**OTION for a peremptory mandamus to the defendant, as mayor of the city of New York, directing him to countersign a warrant of the comptroller, for the payment of the salary of the relator as city inspector, for the months of January and February, 1859.

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*J. W. Edmonds*, for the relator.

*R. Busteed*, for the defendant.

W. F. ALLEN, J. This proceeding is instituted to compel the defendant to countersign the warrant of the comptroller, for the payment of the salary claimed by the relator as "city inspector," for the months of January and February, 1859. Upon the return of the alternative writ of mandamus, the relator, not controverting the facts stated in such return, moves that a peremptory writ issue. There are no disputed facts in the case. Aside from some clerical mistakes as to dates, which do not mislead, and are therefore immaterial, the alternative writ presents every fact necessary to the determination of the controversy, and the return neither traverses nor avoids any facts alleged in the writ.

The parties differ only as to the legal results deducible from those facts. The relator, prior to the passage of the act amending the charter of the city, in 1857, was elected to the office of city inspector for the term of three years, and his term of office would have expired on the 31st day of December, 1858. By the act of 1857, the government of the city was remodeled, and among other alterations the mode of appointment and the tenure of office of the city inspector was changed. No appointment to the office has been made under the provisions of the new charter, and the relator claims that he is still in office by virtue of his election under the former acts. He bases his claim to the remedy by mandamus upon his title to the office. This prerogative writ can only issue to enforce a clear legal right. The relator necessarily tendered an issue upon the legal title—his mere right to the office—not upon the possession and the exercise of its functions under color of right. After alleging the facts, he says: "That he therefore continues to be, and still is, and during the months of January and February, 1859, was, the city inspector of the

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city of New York, and entitled to all the salary, fees, perquisites and emoluments thereof."

The salary and fees are incident to the title and not to the usurpation and colorable possession of an office. An officer *de facto* may be protected in the performance of acts done in good faith in the discharge of the duties of an office under color of right, and third persons will not be permitted to question the validity of his acts by impeaching his title to the office. Public interests require that the acts of public officers, who are such *de facto*, should be respected and held valid as to third persons who have an interest in them, and as concerns the public, in order to prevent a failure of justice. (2 *Kent's Com.* 295.)

It does not follow that a right can be asserted and enforced on behalf of one who acts merely under color of office without legal authority, as if he were an officer *de jure*. When an individual claims by action the office, or the incidents to the office, he can only recover upon proof of title. Possession under color of right may well serve as a shield for defense, but cannot, as against the public, be converted into a weapon of attack, to secure the fruits of the usurpation and the incidents of the office.

It may well be that every act of the relator as city inspector hitherto done by him may be valid, and the city bound by all his contracts and engagements properly entered into, and yet he may not be entitled to claim any thing more than mere protection and immunity from action as an officer *de facto* since the 1st of January, 1859. Evidence establishing the fact that an officer issuing process is an officer *de facto*, is not merely *prima facie* evidence that he is an officer. It is conclusive for the protection of a ministerial officer required to execute such process; but to constitute a person an officer *de facto*, a mere claim to be a public officer, and executing the duties of the office, is not sufficient. There must be some colorable right of office, or an acquiescence on the part of the public for such length of time, as will authorize the presump-

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tion of at least a colorable election or appointment. (*Wilcox v. Smith*, 5 *Wend.* 231.)

Whether the relator was, during the period for which he claims his salary, city inspector *de facto*, or what rights or liabilities result from his acts, either to third persons, the public, or the city government, cannot be determined here. It is claimed by the relator that the title to an office cannot be tried in this proceeding. If so, then the defendant is entitled to a judgment dismissing the writ; for whether the right claimed is established by evidence which would make the relator an officer *de facto*, or by that which would make him such *de jure*, is immaterial. In either case it is proof that he is an officer, in both proving, by evidence differing in degree, that he is an officer *de jure*.

An officer *de facto* is presumed to be an officer *de jure*, and in some cases, as in *Wilcox v. Smith*, the presumption is conclusive; but it is only conclusive when the officer is to be protected in the discharge of his duties, or the rights of third persons, or the public interests are concerned. So that it does not lie with the relator who bases his right of action upon his title, to say that such title cannot be tried in the proceeding instituted by himself; in other words, he cannot preclude his adversary from denying any allegation of fact material to his case. It is true that, ordinarily, a right to office cannot be tried collaterally, as in an action to compel a ministerial officer to perform acts founded upon the proceedings of an officer who is such *de facto*. He has no right to decide on the acts of an officer, or adjudge them to be null. (*People v. Collins*, 7 *John.* 549.)

Assuming all that is claimed by the relator, and that the mayor acts ministerially in countersigning the comptroller's warrant, the right of the relator to call upon him to act depends solely upon his title to the office. The title is not, therefore, collaterally questioned, but is directly in issue, and is the only material fact in the case. It is insisted, on behalf of the relator, that by the omission or failure of the mayor to

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appoint an officer in his place at the expiration of his term of office, he held over and of right exercises the duties of the office, and is entitled to its emoluments. This, I think, depends upon the true construction of the amended charter of 1857. I know of no common law rule by which a public officer appointed or chosen for a specific term, can hold office beyond that term, upon the failure of the proper body to appoint or elect a successor. Officers and agents of private corporations, whose appointment is annual, have, I think, as against the corporations, been held to continue in office after the expiration of the year, when no successor has been appointed, and they have continued to act by the sufferance or permission of the corporation. So, too, in a municipal corporation, the subordinate agents and officers receiving their appointments from the local government, and acting as the servants and agents of the appointing body, may perhaps hold office beyond the term for which they were originally appointed; or at least, so long as they are permitted to act they may bind the corporation in whose behalf they act.

The question has, I think, generally arisen where the rights of a third party have been concerned, and there is a very obvious distinction between such a case and that of a claim by the officer to continue to act as a matter of right and as against the corporation. The case of *McCall v. Byram Manuf. Co.* (6 Conn. Rep. 428) illustrates the point. The service of a summons upon the secretary of the company more than a year from the time of his election had elapsed was attempted to be invalidated, and the court, in a very cautious opinion, sustained the evidence; holding that the officer, although the office was intended to be and was annual, continued until superseded by the appointment of another in his place. The court is, however, very careful to say that neither the charter nor the by-laws limited the official existence of the secretary. The uniform course of legislation is very high evidence that there is no rule of common law by which an individual elected or appointed to office continues in office after the expiration

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of the term limited by law, and until a successor is chosen and qualified. "It is a usual and wise provision in public charters, that the officers directed to be annually appointed shall continue in office until other fit persons shall be appointed and sworn to their places. This was the case in the charter granted to the city of New York in 1686 and 1730." (2 *Kent's Com.* 295, note a.) It is "usual" because it is deemed necessary, and "wise" because it is necessary to enable the officer to perform the duties of his office after the expiration of the term prescribed by law.

Very careful provision is made by the laws of this state for all the cases in which it has been deemed wise to authorize persons in office to hold over beyond the times for which they were appointed or chosen. The act of 1824 (*Laws of 1824*, p. 380) was very general, and applied to all officers who were duly commissioned and had entered upon the duties of their respective offices; and enacted that they should continue in office until their successors were commissioned and sworn. The revised statutes restrict the power to officers duly appointed, (other than justices of the supreme court,) and to sheriffs and clerks of counties, including the register of the city and county of New York. (1 *R. S.* 117, §§ 9, 10.)

The revisers reported a section to the effect that the powers of every other officer who should be elected by the people and not re-elected, should cease with the term for which he had been chosen. This was not enacted, for the reason, doubtless, that it was not deemed necessary. It cannot be urged as evidence that the legislature intended that the converse of the proposed enactment should be the law; else why did the legislature provide in terms for the continuance in office of sheriffs and clerks who were elected by the people, and would have continued in office without the provision?

That provision is evidence, first, that they deemed it necessary, and second, that officers not named were intended to be excluded; *expressio unius*, &c. It has never been supposed that members of assembly or senators would hold over, upon

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the failure of the people to elect a successor. So, too, town officers, with specified exceptions, hold their offices for one year and until others, chosen or appointed in their places, have qualified. (1 *R. S.* p. 347, § 30.)

This careful legislation discloses the mind of the legislature, and is a legislative exposition of the common law rule upon this subject. The colonial charters of the city made provision for the performance of the duties of certain officers, by those duly commissioned, until successors should be duly qualified. But a city inspector was not then known, and of course is not named. (*Davies' Laws*, 153, 171, &c.) By the act of 1857, the "Dongan and Montgomerie charter" is preserved; but all acts amending the charter, and all laws inconsistent with that act, were repealed by the act of 1857, (§ 54.)

The relator was elected to the office under one of the acts thus in terms repealed. When the repealing act took effect the former acts ceased to exist, except so far as they were expressly retained. All power granted by the repealed acts was revoked, and all commissions under those acts terminated with the acts themselves. A law repealed is as no law, and as if it had never existed, except as to the rights accrued and vested under it; and the right to hold office for a given term is not a vested right, within the exception. In the act of 1849, amending the charter, it was enacted that all officers who should be in office when that act should take effect, should hold their offices until their successors should be duly qualified, (*Davies' C. L.* 209, § 526,) which is but another legislative expression of opinion as to the necessity of such a provision. A like provision is embodied in the act of 1857, and made applicable to all persons in office under the city government, excepting certain officers, (one of whom is the "city inspector,") who should "continue in office until the expiration of their several terms." (*Act of 1857*, § 351.) This clause modified the repealing clause of the act, and made it take effect, so far as it affected the office of the relator, at the

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expiration of his term of office. The legislature did not shorten his term of office, but upon the expiration of the term for which he was elected, the repealing clause took full effect, and of course the official existence of the relator, derived under and dependant upon the repealed act, ceased.

It is very likely that could the legislature have foreseen, or had they thought it possible, that the mayor would be so unmindful of his duty as to fail to nominate his successor, or so unfortunate as to be unable to nominate one who should prove acceptable to the board of aldermen, they might have provided for the continuance in office of the relator until his successor should be qualified. But by compelling the mayor, upon the rejection by the aldermen of one nominee, to nominate another immediately, they have not left it optional with the mayor to suffer a vacancy to exist, and the contingency which has occurred was not foreseen. But it is sufficient for this case that the legislature have not continued the relator in office after the 31st of December, 1858.

The heads of the executive departments, as organized and appointed under the act of 1857, held office for two years, and until the appointment of their successors. (*Act of 1857, § 21.*) It is very evident that this section has no reference to those in office at the time the act should become a law. Aside from its terms, which indicate its application to those to be appointed under the act, provision is made in subsequent sections in respect to those then in office. *Tully v. The State* (1 *Carter's R.* 500) is, I think, in principle, decisive of this case. The syllabus of that case, so far as pertinent, is to the effect, that when there is an express or implied restriction, in a charter of incorporation, upon the time of holding office under such charter, as that the officers shall be annually elected on a particular day, and that they shall hold from a charter election day until the next, or that they shall be elected for the year ensuing, only, in such cases the officers cannot hold over beyond the next election day, or the end of the year. When, by the constitution of the corporation, the

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officers are elected for a term, and until their successors are elected and qualified, or when they are elected, for "the year ensuing," and the charter contains no restrictive clause, the officers may continue to hold their offices after the expiration of the year, and until they are superseded by the election of other officers to fill their places. The action was against the sureties of school commissioners who had been elected and had qualified under an act which, as in this case, had been repealed, 'for a default happening after their term of office had expired. The court, in the opinion, quote the language of the last act, and say that it is as if it had read, "Be it enacted, that in each county of this state in which there is no school commissioner, one shall be elected at the next annual August election. That in each county where there is a school commissioner now in office, such commissioner shall continue to hold for the term for which he was elected."

This is substantially the provision of the act of 1857 under consideration, and the courts in Indiana say of the act of that state, "These provisions in effect repeal the clause in the law of 1831, authorizing Tully to hold over till the qualification of a successor, and, as we think, place his case among those of the first class recounted in this opinion, in which there is an implied restriction upon the right of holding over." The head note of the reporter upon this branch of the case is: "Under the act of 1831, a school commissioner could have indefinitely held his office until the election of a successor, and in such case his sureties would have been liable for his acts during his continuance in office. The act of February 2d, 1838, repealed the act of 1831, and limited the terms of school commissioners to the precise times for which they were elected, and the sureties are not liable under the law for the acts of the commissioner after the expiration of his term."

Now, it is not necessary to say, with the court in the case cited, that if there is no restriction, express or implied, in the law, an officer, elected for a given time, may hold over

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until superseded by his successor, for the reason that in this case, within the rule laid down, there is a restriction imposed by the act limiting the term of office of the relator to the precise term for which he was elected.

I am of the opinion, that upon his own showing, and upon the just construction of the act of 1857, he did not continue in office after the 31st of December, 1858. 1st. By the repeal of the act under which he took office—which repeal took full effect upon his office on the day named—his authority as city inspector wholly ceased. 2d. There is no provision of law in force authorizing him expressly, or by implication, to continue to perform the duties of the office after that day. 3d. His term of office is expressly limited by the act of 1857 to the time for which he was elected, which expired on that day.

It follows that he has not established a right to the writ for which he asks, and the motion must be denied with costs.

[NEW YORK SPECIAL TERM, May 2, 1859. *W. F. Allen*, Justice.]

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VROOMAN *vs.* DUNLAP.

A complaint alleged that the plaintiff, being the owner of a farm, sold and conveyed it to the defendant, who, in consideration thereof, promised and agreed to pay the plaintiff \$2700 therefor. That the defendant paid \$200, and gave the plaintiff a mortgage on the premises, to secure the payment of \$2500, the remainder of the purchase money; that no bond was given as collateral to the mortgage, but the defendant agreed not to commit waste on the premises, by cutting timber or otherwise, and that the farm should be kept and preserved in as good condition as it was at the time of sale; that to induce the plaintiff to waive the giving of a bond by the defendant, the latter falsely and fraudulently represented that he purchased the farm for a homestead for his son; whereas, in truth and in fact, he purchased the same for the purpose of selling it at an advance, to one D. who was without means and unable to purchase such a farm. That the defendant, two days after he had so purchased the farm, sold and conveyed

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it to D. without any covenant or agreement from him restraining the commission of waste, or obliging D. to keep the premises in good condition and preserved from waste and depreciation in value. That the defendant suffered and permitted D. to cut and destroy the timber on said farm, and the fences, farm and buildings to become ruined, dilapidated and greatly depreciated in value, to the amount of \$800. That the mortgage had been foreclosed, and the farm was sold for a sum insufficient to pay the same; the deficiency being over \$800. The complaint then prayed that the defendant might be adjudged to pay to the plaintiff the amount of such deficiency, with interest, &c. *Held* that the complaint did not state facts sufficient to constitute a cause of action; and that it was properly dismissed for that cause.

**A** PPEAL from a judgment entered upon a nonsuit ordered at the circuit. The case is stated in the opinion.

*W. H. Engle*, for the plaintiff.

*De Puy & Bowen*, for the defendant.

*By the Court*, MARVIN, J. The plaintiff's counsel opened the case to the jury, when the defendant's counsel moved the court to dismiss the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. The court so decided, and dismissed the complaint, and the plaintiff excepted. I have examined the complaint with care. It is not always easy, under our present system of pleading, to ascertain clearly what notions the pleader had of his client's case or rights, or to what branch of the law he intended to resort, for the redress of his client's supposed grievances.

In this case the complaint tells me, in substance, that the plaintiff owned a farm in Orleans county, in March, 1857; that he bargained, sold and conveyed it to the defendant; and that the defendant, in consideration thereof, promised and agreed to pay the plaintiff \$2700 therefor. That he paid \$200, and executed to the plaintiff a mortgage on the premises as collateral security for \$2500, the remainder of the purchase money; and that in consideration of the sale and conveyance of said premises and of the execution of the mort-

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gage on said premises as collateral security for a portion of the purchase money aforesaid, and also in consideration that the plaintiff would waive the execution of a bond to the plaintiff to accompany the mortgage, the defendant agreed, undertook and promised with the plaintiff not to commit waste on said premises, by cutting timber or otherwise, and that the farm should be kept and preserved in as good a condition as it was at the time of sale, while the mortgage remained unpaid. And to induce the plaintiff to believe that the said farm would be by him preserved from becoming lessened in value, and to rely on the same as security for the payment of the said purchase money; and to induce the said plaintiff to waive the execution of said bond and give the deed aforesaid, the defendant falsely and fraudulently represented and affirmed to the plaintiff, at the time and place aforesaid, that he purchased said farm for a homestead for his son; whereas in truth and in fact he purchased the said farm for the purpose of selling the same at an advance, to one Dygert, who was without means, and wholly unable to purchase property of the value and to the amount of said farm. And the plaintiff further avers, that the false and fraudulent representations above mentioned had a material influence with and upon him in inducing him to execute and deliver to the defendant the deed of the said farm, at the time and place aforesaid. That the defendant, two days after he purchased the farm, sold and conveyed it to Dygert without any covenant or agreement from and with Dygert restraining him from committing waste, or obliging the said Dygert to keep the premises in good condition, or providing for preserving the said premises from waste and depreciation in value. He further shows that the defendant suffered and permitted Dygert to cut and destroy the timber on said farm, and suffered and permitted the fences, farm and buildings to become ruined, dilapidated and greatly depreciated in value, to the amount of about \$800. A foreclosure of the mortgage is then alleged, and a sale of the farm for a sum insufficient to pay the mort-

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gage. The deficiency on the 6th July, 1857, the day of sale, was \$893.53. The plaintiff then prays that the defendant may be adjudged to pay to the plaintiff the said sum of \$893.53, and interest, or such other sum as shall to the court seem just and equitable.

The case does not contain the opening of counsel to the jury. I am not therefore advised upon what ground he then put the case. In his points, now, he alleges that the agreement was that the defendant should pay the plaintiff for the farm \$2700, of which he paid \$200, and gave the mortgage for the remainder; that the defendant's promise to pay is not merged in the deed or mortgage; that the mortgage was only a security for the payment of the purchase money; and he claims that the plaintiff may recover in this action the deficiency. Some cases are cited, which the counsel supposes sustain these positions. Whatever may once have been the law upon this point, there can be no doubt what it now is, and has been, since the enactment of the revised statutes, which declare that "No mortgage shall be construed as implying a covenant for the payment of the sum intended to be secured; and when there shall be no express covenant for such payment, contained in the mortgage, and no bond or other separate instrument to secure such payment shall have been given, the remedies of the mortgagees shall be confined to the lands mentioned in the mortgage." (*See Hone v. Fisher*, 2 Barb. Ch. 559.)

The points contained some positions touching the allegations in the complaint, of the false representations and promises, but no authorities or cases are cited. It is not easy to fancy what use the pleader intended to make of the allegations in the complaint of a promise not to commit waste, and that the farm should be kept and preserved in good condition. The owner in fee of land promises that he will not commit waste on his own land. The promise is made to a mortgagee. I always supposed that waste had some reference to land in which some one other than the possessor had an interest by

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way of remainder or reversion. I did not suppose that the absolute owner in fee could be guilty of waste upon his own land. But suppose the pleader did not use the term in the sense the law uses it, but intended simply to allege that the defendant promised not to cut timber, &c. and that he intended his action to be an action upon the promise or contract to recover damages for the breach; what then? I will not spend time in endeavoring to show that no such action, under the circumstances of this case, could be maintained. All the agreement between the parties, and all the representations, were made before the deed was executed and the mortgage given, and the statute says that the remedies of the mortgagee shall be confined to the land, &c. The allegations of a promise not to commit waste, and of fraudulent representations, were not the gravamen of the action. They were irrelevant, and would have been stricken out on motion.

The complaint was properly dismissed, and the judgment should be affirmed.

Judgment affirmed.

[*ERIE GENERAL TERM*, November 28, 1859. *Greene, Marvin* and *Davis*, Justices.]

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*HAWKINS vs. BROWN & JEFFERY.*

Prior to June 28, 1855, the plaintiff and defendants were partners, in the business of manufacturing machines, at Corning, in this state. On that day they agreed to dissolve the partnership; the defendants to give up to the plaintiff certain notes held by the former against him, for \$3000, and to give him a shingle machine, and also to construct for him an engine and mill of machinery, which the plaintiff was to set up and run until, from one half the net earnings thereof, to be received by the defendants, they were fully paid for such machinery, less the sum of \$300, which was to be deducted from the price. The defendants manufactured the engine and machinery, but on demand by the plaintiff, refused to deliver the same, on the ground

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that the plaintiff had purchased a lot of land in Pennsylvania, on which he proposed to erect the said machinery; that for the purchase money thereof, \$1541, he had confessed judgments which had been duly docketed, so as to become liens upon the land; that by the law of Pennsylvania the erection of this machinery upon the premises would make such machinery a part of the realty, so that the judgments would attach to the same as liens, and a sale of the land would pass title to such machinery to the purchaser.

- Held*, 1. That the plaintiff could not recover of the defendants for the price of the shingle machine, in the absence of any proof of a previous demand and refusal of delivery.
2. That in respect to the engine and machinery, if the law of Pennsylvania were as claimed by the defendants, the plaintiff had no right to require the delivery of that property in order that he might turn it over to pay, or secure, a precedent debt, in fraud of the defendants' claim for the purchase money.
3. That the defendants being, by the express terms of the contract, authorized to retain the title to the machinery until the purchase money was paid, they were not bound to relinquish their title to the property, or to allow the property to be sent out of the state, whereby they would be deprived of the same, or their lien upon it.
4. That evidence to show that the law of Pennsylvania was as claimed by the defendants, was admissible, and ought to have been received. JOHNSON, J., dissented.

THE plaintiff and defendants, being partners, under the name of Brown, Jeffery and Co., on the 23d of June, 1855, made an agreement in writing, by which the latter agreed to purchase of the former his interest in the partnership property and business, and pay him, for the same, certain notes which the said Brown, Jeffery & Co. held against him for \$3000, he paying the interest thereon; and further agreed to give the plaintiff a shingle mill in good condition for business, and also to manufacture and construct a bill of machinery, engine, &c. which the plaintiff was to set up and run, the defendants to have one half the net earnings thereof till the whole bill should be paid, less \$300 to be deducted from the bill, when the plaintiff should have paid for the same, except the said sum of \$300, when the defendants were to give a title to the machinery, and upon which payment they were to deduct the said \$300 from their regular price of the same, and the plaintiff, in consideration of the premises, agreed to sell all his

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interest in the business of Brown, Jeffery & Co.; and it was also understood and agreed that the machinery, except the shingle machine, should belong to the defendants till a full performance of the agreement by the plaintiff. The price and capacity of the engine and machinery was fixed by the agreement. This action was brought for a breach of the agreement. The alleged breach consists in the refusal of the defendants to manufacture and construct the engine and machinery, and to allow the plaintiff to set up and run the same; and the plaintiff claimed, by way of damages for the breach, the \$300, which, by the agreement, was to be deducted from the bill of machinery upon payment therefor, the expense incurred by the plaintiff in making the necessary preparation to set up and run the machinery, and the price of the shingle machine which he did not want, and declined to take without the other machinery. The defense, as set up in the answer and by the evidence on the trial, consisted of, 1. A general denial. 2. Allegations of performance as respects the notes and the shingle machine. 3. Breach of the contract by the plaintiff in refusing to set up and run the machinery in the state of New York, or elsewhere than in the state of Pennsylvania, and upon premises which he does not own, or which are incumbered to their full value, and his refusal to give the defendants security against the probable loss of the machinery, by reason of his not having a free and unincumbered title to the premises on which he proposed to set up and run the machinery. 4. An offer on the part of the defendants to allow the plaintiff to set up and run the machinery at any place in the state of New York or elsewhere on premises to which the plaintiff has a title, or which is not incumbered to an amount which will jeopard the title of the defendants, and the refusal of the plaintiff to accept such offer.

Upon the trial, after the plaintiff had gone through with his case and rested, the defendants offered to prove a conveyance by one Devlin to the plaintiff of the land at Lockhaven, in the state of Pennsylvania, on which the plaintiff proposed

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to set up and run the machinery; that the plaintiff, to secure the purchase money, gave Devlin judgment notes on which judgment, had been entered, and which were a lien on said land; and that by the law of that state, placing the machinery on the said land would subject the same to the lien of the judgment, and the same would pass to the purchaser under a sale upon the judgment. To the exclusion of this evidence by the court, on objection on the part of the plaintiff, the defendants excepted. The defendants having given evidence on their part in answer to the plaintiff's case, and rested, the court charged the jury that if the defendants were guilty of a breach of the agreement and the plaintiff had offered to perform, the latter was entitled to recover by way of damages the amount expended by him in preparing to set up the machinery, amounting to \$746.67, deducting \$400, which he had realized out of that sum, together with the \$300 which by the terms of the contract was to be deducted from the bill of machinery, and the value of the shingle machine, proved at \$200. The court also charged the jury that the contract for the machinery and the shingle machine was entire, and the plaintiff was not bound to accept the latter without the former. The defendants excepted to so much of the charge as related to the allowance by way of damages of the \$300 which was to be deducted from the price of the machinery; also to so much of the charge as related to the allowance of the \$200 as the value of the shingle machine; also to that part of the charge by which the jury were instructed that the contract was entire, and the plaintiff was not bound to accept the shingle machine without the other machinery; also to the refusal of the court to charge that as to the shingle machine the contract was performed.

The jury found a verdict in favor of the plaintiff for \$346.67, and from the judgment entered thereon the defendants appealed.

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*Wm. Irvine*, for the appellants.

*Geo. T. Spencer*, for the plaintiff.

E. DARWIN SMITH, J. From the agreement given in evidence on the trial it appears that, previously to June 23d, 1855, the plaintiff and defendants were partners in business, engaged in manufacturing machines, at Corning, in this state. On that day they agreed to dissolve the partnership, the defendants to give up to the plaintiff certain notes held by the firm against him, for \$3000, and to give him a shingle machine, and also to manufacture and construct for him an engine and bill of machinery, which the plaintiff was to set up and run until, from one half the net earnings thereof to be received by the defendants, they were fully paid for such machinery, less the sum of \$300, which was to be deducted from the price, according to the regular rates of work at the shop of the company. No time being fixed for the delivery of these notes, the true construction of the contract would require them to be delivered simultaneously with, or immediately upon, the execution of the contract, and they were doubtless so delivered. The contract was thereby, at that time, so far executed as that the partnership between the parties then became and was, *ipso facto*, dissolved. So far as related to the delivery of the engine and machinery the contract was necessarily executory, for such machinery and engine were thereafter to be constructed. But the dissolution of the partnership was clearly not suspended till such machinery and engine were constructed and delivered, and did not depend upon the fulfillment by the plaintiff of this part of the contract. It was the obvious intent of the parties that such partnership should be dissolved in fact immediately. The shingle machine was also to be delivered immediately, and its delivery could have been instantly required by the plaintiff; and such delivery was in no way connected with the delivery of the engine and ma-

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chinery thereafter to be manufactured. It was error, therefore, I think, to allow the plaintiff to recover for the price of the shingle machine, the same never having been demanded and delivery refused.

But the more important inquiry relates to the engine and machinery which the defendants were thereafter to manufacture. The agreement to manufacture and deliver this property is, I think, to be construed and enforced like all other executory agreements, to sell and deliver property at a future time. The defendants were clearly bound to fulfill the contract on their part, unless they had some just and legal excuse for their non-performance; and this presents the chief point in controversy in the cause.

It appears that the defendants manufactured the engine and machinery in question, and on demand by the plaintiff refused to deliver it. In excuse for such non-performance, the defendants offered to prove, on the trial, that the plaintiff had purchased a lot of land at Lockhaven in Pennsylvania, on which he proposed to erect the machinery in question; for the purchase money for which, amounting to \$1541, he had confessed judgments which had been duly docketed, so as to become liens upon said land. They also offered to show, that by the law of Pennsylvania the erection of this machinery upon the premises covered by said judgments, would make such machinery a part of the realty, as to all the world except as between landlord and tenant, so that the judgment would attach to the same as liens, and that a sale of the land would pass the title to such machinery to the purchaser. And the defendant also offered to show that this would be the case, notwithstanding, by the terms of the contract, the defendants were to retain the title till the purchase money was fully paid. These offers were overruled by the court, and the defendants duly excepted.

I cannot see why this proof was not admissible, and think it ought to have been received. If the law of Pennsylvania were, as is assumed in the offer, and we are bound so to con-

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sider it in passing upon these exceptions, then it seems to me quite clear that the plaintiff had no right to require the delivery of such engine and machinery in manner and form as demanded. He proposed, in effect, to turn over this machinery to pay or secure a precedent debt to another creditor, and deprive the defendants of their property without payment of the purchase price, and contrary to the plain intent of the contract. Every contract is to be construed with reference to the law of the place where it is made and where the contracting parties reside, unless it expressly has reference to the law of some other state or country. By the express terms of this contract, the defendants were to retain the title to the machinery until the purchase money therefor was paid. They clearly were not bound to relinquish their title to this property, or to allow it to be sent out of the state, whereby they would be deprived of their property, or of their lien upon it, by operation of law. They never contracted to do any such thing. The right of the defendants to refuse to deliver the engine and machinery under such circumstances, it seems to me, are as plainly equitable as the right of stoppage *in transitu* in case of the insolvency of the vendee, or the right of a vendor under all circumstances to refuse to deliver, and to reclaim property after delivery, when the vendee has made the purchase, or procured possession in contemplation of insolvency, or with the design to assign or transfer the property to other creditors. It is true, as is urged by the plaintiff's counsel, the defendants were bound to perform their contract; but their duty was to perform it *according to its true intent and meaning*. It was not the intent or meaning of this contract that the defendants should deliver this machinery *absolutely*, or that they should in any way relinquish their title to it until the purchase money was fully paid. To require them to deliver when such would be the consequence, would be to require something not within the terms, provisions or intent of the contract—to require something clearly unjust and inequitable. To insist on performance with such an

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object and intent on the part of the plaintiff, was substantially to insist on the right to commit a palpable fraud upon the defendants. Where performance is required for such an object, or will be attended with such results, it has ceased to be a duty. The right to refuse performance in such a case is absolute. It is part of the right of self-defense, or of the right to protect one's own property from unjust or fraudulent invasion or sacrifice, inherent in all men. But it is said by the counsel for the plaintiff, that if the rule of law in Pennsylvania be as claimed, there is no rule or comity which requires the courts of this state to respect that law, or allow it in any form to be acted on or enforced here. The fact that such is the law of that state, is a sufficient reason why we should not compel our own citizens—the rule of law on the subject being different in that state—to subject their property to the jurisdiction of such foreign law. We have nothing else to do with the laws of Pennsylvania. We are not called upon to enforce them. We are simply called upon to protect our own citizens from fraud and injustice attempted to be perpetrated through the instrumentality of such laws. No court of equity would enforce this contract specifically, by compelling the defendants to deliver the machinery in question to be immediately sent by the plaintiff to the state of Pennsylvania, and subjected to the lien of the judgments in that state referred to. And if this be so, the same facts are, or ought to be, a sufficient excuse for non-performance at law. The defendants, as I hold, have not refused performance according to the true intent and meaning of the contract. They are not guilty of any breach of the contract. The proof shows that in fact they were ready and willing to deliver the machinery, provided their security should remain unimpaired. They were not bound to deliver upon any other terms or conditions. It is true that the jury have found that the defendants refused to deliver, but they could hardly do otherwise under the charge, for the defendants had confessedly refused to deliver the machinery to be sent out of the state. But if the question had

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been put to the jury, whether the refusal to deliver, &c. was without *justifiable cause*, they could not reasonably have found for the plaintiff, except upon the hypothesis that the defendants were bound to deliver, absolutely, whatever was done or proposed to be done by the plaintiff, with the property. This was the theory of the charge. I think it a mistaken one, and that there should be a new trial, with costs to abide the event.

T. R. STRONG, J., concurred.

JOHNSON, J., (dissenting.) I am unable to agree with my brother SMITH, in his views of the law applicable to this case. To hold the defendants' excuse, for not delivering the engine in question, according to their agreement, a valid one, would, as it seems to me, introduce a novel and dangerous element, into the law of contracts for the sale and delivery of property. The defendants had undertaken, for a valuable consideration, to manufacture this engine and to sell and deliver it to the plaintiff, at a reduced price, to be paid for by him in a particular manner. They manufactured it, but refused to deliver it, when demanded by the plaintiff. The only ground of refusal was, that in case they delivered it, the plaintiff contemplated putting it in operation upon certain premises in the state of Pennsylvania, which he had then purchased for that purpose, and for which he had given judgment notes, upon which judgments had been entered and became liens upon the land. The effect of this, as the defendants alleged and offered to prove, according to the laws of that state, would be to give the judgment creditor a lien upon the engine, when thus placed upon the premises, superior to their title. Assuming that the plaintiff would have no right under the agreement, after the property was delivered to him by the defendants, to dispose of it, or place it in any situation by which the defendants would be deprived of their title, which by the agreement they were to retain, it by no means follows that the defend-

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ants would for that reason be justified in their refusal to perform.

Each party to a contract is bound to perform, according to its terms, and the true intent and meaning of its provisions; and the remedy of each, for a refusal to perform by the other, is, by action upon such contract, to recover damages. Had the plaintiff, after the performance by the defendants, been guilty of any breach on his part, they would have had their remedy by action against him upon the contract, to recover all the damages they had sustained by reason of such breach. They do not place their refusal to perform, upon any ground of fraud or insolvency on the part of the plaintiff. There is no such element in this case, and no pretense that the plaintiff is not abundantly able to respond in damages for any breach of the agreement, on his part. Their justification is placed simply and solely upon the apprehension, or expectation on their part, or if you please, upon a well grounded assurance, that if they performed, the plaintiff might not perform on his part, but, on the contrary, would do something which he had no right, according to the intent and meaning of the contract, to do, with the property. Will this justify the refusal by a party to perform his agreement? If it will, I yet have to learn that such is the law. Fraud, as we all understand, vitiates all contracts, and absolves the innocent party from all obligation to perform on his part, if he elects to rescind upon that ground. But here is no fraud, and no insolvency, alleged or proved; and how the defendants can possibly be allowed to refuse performance under such circumstances, without giving the other party a right of action, is more than I am able to understand. Was it ever before heard, that one party to a contract would be justified in refusing to perform it, simply because the other party might break it afterwards? I think not. The defendants do not pretend that the plaintiff had broken the contract, on his part. What they pretend is that he contemplated breaking it after performance by them. And this must be held equivalent to an actual breach, or a fraud, by the plain-

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tiff, before the defendants can be justified in refusing to perform. The defendants here did not even rescind the contract, nor attempt to do so. Indeed it is plain there is no ground upon which they could have rescinded, had they offered it. But they did not; they kept what they had received, and refused to pay what they agreed to pay for it, and the plaintiff is to be held remediless. The plaintiff had fully performed the agreement on his part, except paying for the engine, which he was not to pay for presently. That was a purchase upon a long credit, and part of the price was obviously paid in the transfer by the plaintiff of his interest in the partnership property. The case was evidently tried upon the assumption that the plaintiff had transferred all his interest in the partnership property, in part performance of the agreement on his part. The fact is expressly alleged in the defendants' answer. In cases of fraud, even where there has been part performance, the law will not allow the innocent party to rescind and avoid the contract, without restoring what he has received under it, and placing the other party in *statu quo*. But here the defendants are allowed to refuse performance with impunity, without rescission or restoration. It is suggested in the prevailing opinion, that if the question whether the defendants ought to have delivered the engine, had been submitted to the jury, they might have rendered a different verdict. But as the question is one of law strictly, it would have been clearly erroneous to submit it to a jury.

The only doubt I have had in regard to the case, was in respect to the measure of damages adopted at the circuit, in allowing the defendants to recover the value of the shingle machine. It is evident, I think, on the whole case, that what the defendants promised to pay the plaintiff, for his interest in the partnership property, was the amount of the reduced price of the engine, and the shingle machine; and by allowing him to recover these two items, he was only recovering back, of the defendants, what he had paid them in the transfer of his partnership interest. By the terms of the contract the de-

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defendants were to give the plaintiff a shingle machine in good condition for business. It seems from the evidence that at the time the contract was entered into, the defendants had such a machine, at Lockhaven, where the plaintiff proposed to put up and operate the engine, and that it was understood between the parties, that the plaintiff might take it there. The plaintiff never did take it, but left it where it was when the contract was made. He might have taken it, and the reason he assigns for not taking it is, that he expected to run it, with the engine which the defendants agreed to deliver, and they having refused to deliver the engine, according to their agreement, he was without any motive power to operate the machine in the manner contemplated by the agreement, and declined accepting it unless he could have the engine also. It is clear, I think, that the title to the shingle machine did not vest in the plaintiff by the agreement. And inasmuch as he never reduced it to his actual possession, it never became his property. When the defendants, therefore, refused to deliver the engine, according to the agreement, the plaintiff had the right to treat the whole of the contract, not actually performed by them, as broken, and to decline taking this machine. The defendants clearly could derive no advantage, by tendering the shingle machine, and at the same time refusing to deliver the engine. They should either perform, or offer to perform, the whole contract; and are not permitted to say that the plaintiff was offered, and might have taken, part, notwithstanding their refusal to perform the other part. If the title to the shingle machine never actually vested in the plaintiff, and the contract has been broken by the defendants, its value is the subject of recovery as part of the damages. The other items were, I think, clearly correct. I am therefore of the opinion that the judgment should be affirmed.

New trial granted.

[MONROE GENERAL TERM, December 5, 1859. *T. R. Strong, Smith and Johnson, Justices.*]

## HAIGHT vs. SAHLER and others.

Where the defendants, having been duly appointed by a corporation its building committee, and authorized to contract for materials for erecting a building in which to conduct its business, entered into a written contract with the plaintiff, under their respective hands and seals, describing themselves therein as "building committee," and signing it as such, for the purchase of a quantity of brick; *Held* that the corporation was liable, on the contract, notwithstanding the seals of the defendants were affixed thereto. And, the defendants having shown that they were fully authorized by the corporation, in fact, *a priori*, to make the contract, and that after it was so made, the corporation ratified it, by making several payments thereon, and otherwise; *Held also*, that the defendants were not liable personally, on the contract.

**A**PPEAL from a judgment entered upon the report of a referee. The action was brought upon articles of agreement made between the parties, under seal, and was for the recovery of the money therein agreed to be paid by the defendants. The action was referred to a referee, who, by his report, found as matter of fact, that on or about the 3d day of September, 1855, the defendants entered into a contract with the plaintiff, under the respective hands and seals of the parties, in these words:

"This agreement, made the third day of September, one thousand eight hundred and fifty-five, between John Haight, of the town of Arcadia, in Wayne county, and state of New York, of the one part, and John P. Sahler, Robert Robinson and Andrew O. Lamoreaux, building committee, appointed by the trustees of the Wayne County Collegiate Institute, located in the village of Newark, of the other part, witnesseth: that the said John Haight, for the consideration hereinafter mentioned, agrees to sell to the said John P. Sahler, Robert Robinson and Andrew O. Lamoreaux, building committee, two hundred and fifty thousand bricks, manufactured of suitable and proper materials, and to be delivered between this date and the first of November next, and all the bricks manufactured by the said John Haight this season, hereafter, up to the number of two hundred and fifty thousand, besides the first mentioned

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two hundred and fifty thousand bricks; all of said bricks shall be of good quality and suitable for its intended purposes, such as the said John P. Sahler, Robert Robinson and Andrew O. Lamoreaux, or their successors or assigns, may accept, for putting in the walls of the building of said collegiate institute, and to deliver said number of bricks to the said building committee, (or agents in their employ,) in the brick yard of the said John Haight, in the village of Newark, in such amount and numbers of bricks, and at such times, as the said John P. Sahler, Robert Robinson and Andrew O. Lamoreaux, building committee, or their successors, shall from time to time direct and require of the said John Haight. In consideration whereof, the said John P. Sahler, Robert Robinson and Andrew O. Lamoreaux, building committee, or their successors, agree to pay to the said John Haight the sum of four dollars and twenty-five cents for each and every thousand of said brick, upon the final and complete delivery of every hundred thousand thereof of the first named two hundred and fifty thousand bricks, and the same for the next two hundred and fifty thousand bricks, upon the final and complete delivery thereof, or so much of the last mentioned number as the said John Haight can manufacture or deliver the present season, besides the first named two hundred and fifty thousand.

In witness whereof, the parties to these presents have hereunto set their hands and seals, the day and year first above written.

JOHN HAIGHT,	[L. s.]	
JOHN P. SAHLER,	[L. s.]	
ROBERT ROBINSON,	[L. s.]	} <i>Building Committee.</i>
A. O. LAMOREAUX,	[L. s.]	

Signed, sealed and delivered in the }  
presence of WILLIAM R. PARKHURST." }

That in pursuance of the said contract, the plaintiff delivered to the defendants, or persons in their employ, for the purpose of the erection of a building for the Wayne County Collegiate Institute, between the date of the contract and the

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8th day of December, 1855, brick to the amount of one hundred and ten thousand; that six thousand of said brick were of a poor quality, not suitable to be put into the building; that six thousand six hundred and fifty were sold by the mason in charge of the building, after the brick were delivered by the plaintiff, and that the balance of the said brick were used in and about the erection of the said building; that the brick were delivered as fast as they were required by the defendants; that all brick required were delivered, and that the plaintiff was ordered by the defendants to deliver no more brick, by reason that the erection of the said building was stopped in December, 1855; that the price agreed upon for said brick was \$4.25 per thousand, making the sum to be paid for the brick \$442, of which sum \$183 was paid prior to December 15th, 1855. The referee thereupon decided as matter of law, that the plaintiff would be entitled to recover of the defendants the sum of \$259, with interest thereon from the 15th day of December, 1855, to the 15th day of October, 1858, being in the whole \$310.37, if the defendants were personally liable. But he further decided as matter of fact, that before and on the 18th day of August, 1855, and until after the sale and delivery of the brick, the Wayne County Collegiate Institute was an academy duly incorporated and organized by the election of trustees, and by a charter or instrument sanctioning such incorporation, granted by the regents of the university; that prior to the 18th day of August, 1855, meetings of the trustees of said Wayne County Collegiate Institute had been held from time to time; that said Wayne County Collegiate Institute was in possession of and owned the lands upon which they proposed to erect a building for such academy; that at a meeting of the trustees on the 18th day of August, 1855, the defendants were appointed a building committee for the purpose of the erection of said building and making the necessary contracts therefor; that the contract for brick hereinbefore set forth, was made by the defendants as such committee; that they

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were duly authorized to make such contract as such committee, and that the contract was ratified by the action of the trustees, by payments toward the brick furnished under the contract, and by the use of the materials in the building, and that it was not the intention of the parties, as appeared from the face of the contract, and the capacity in which the defendants acted, that they should become personally liable. The referee held that the case of *Randall v. Van Vechten* (19 John. 60) applied to this, and that he was bound by it. He therefore decided as matter of law, that the defendants were not personally liable, and that they were entitled to judgment against the plaintiff for their costs.

Judgment having been entered upon this report, in favor of the defendants, the plaintiff appealed.

*S. K. Williams*, for the plaintiff

*T. Hastings*, for the defendant.

*By the Court*, E. DARWIN SMITH, J. The referee by whom this cause was tried, has put his decision expressly on the case of *Randall v. Van Vechten and others*, (19 John. 60.) In that case the defendants were a committee of a municipal corporation, and contracted for work to be done for the benefit of their principals, the city of Albany, by agreement under their private seals. In this case, the committee have contracted in like manner for a religious corporation. There is nothing, I think, in the point that the defendants, in the case of *Randall v. Van Vechten*, were *public agents*. They were agents of a corporation just as liable to be sued as any private corporation. The irresponsibility which protects public officers, and other agents of government, acting within the scope of their authority, does not apply in favor of the agents of such corporations. Persons assuming to contract as agents for corporations, as well as for individuals, must see to it that their principals are legally bound by their acts; otherwise the

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law holds them individually responsible. (4 *Mass. Rep.* 595. *White v. Skinner*, 13 *John.* 307. *Story on Agency*, §§ 185 and 204. *Meech v. Smith*, 7 *Wend.* 315. *Paley on Agency*, 386.) This is a cardinal and fundamental rule in the law of agency. The contract in this case, as much as that in the case of *Randall v. Van Vechten*, it is perfectly evident, was in fact made exclusively for the benefit of the corporation. It appears upon its face that the 250,000 brick, which the plaintiff was to manufacture and deliver under the contract, "were to be of good quality, and suitable for its intended purpose, such as the defendants, or their successors or assigns might accept, for putting in the walls of the building of said collegiate institute," of which the defendants are therein described as the *building committee*. It also appears in this case—in which respect it differs from that of *Randall v. Van Vechten*—that the defendants, before the making of the contract, were expressly authorized by the resolution, duly passed by the board of trustees of the corporation, "to contract for the furnishing the materials and doing the work necessary to be furnished and done in erecting the said institution, and also in superintending the building thereof." If this contract were by parol, no doubt, I think, would exist, or question be made, in respect to its being a valid and binding contract of the corporation. The fact that the defendants sealed it with their seals creates all the difficulty in the case. As a deed, it is not the deed of the corporation, confessedly. It is not signed by the appropriate officers of the corporation, and is not under the corporate seal. An action of covenant, according to the former names and forms of actions, clearly would not lie on it against the corporation. Strict principle I think would require, in the practical application of the rule, that the agent must see to it, in making his contract, that he binds his principal—that he binds such principal in the manner and form in which he contracts, so that the other party to the contract may have his appropriate remedy by action in form on the contract itself. But this rule has been departed

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from too long, and in too many cases, for any but a court of ultimate review and of final decision to return to first principles. The case of *Randall v. Van Vechten* is a distinct departure from this principle. It holds that *assumpsit* lay against the principal in that case, on the contract. This case was distinctly approved, and its doctrine in this particular reasserted in *Dubois v. The Delaware and Hudson Canal Company*, (4 *Wend.* 288.) In that case the contract was also under seal. Judge Marcy says: "The contract was not binding on Warts (the agent) individually, it appearing that he had authority from the defendants to make it. Although it was under the seal of the defendants' agent, his seal was not the seal of the corporation, and the proper form of action against the defendant was *assumpsit*." The principle of the case of *Randall v. Van Vechten* is also expressly approved in the case of *Brockway v. Allen*, (17 *Wend.* 40;) also in *Gale v. Nixon*, (6 *Cowen*, 448;) *Hicks v. Hinde*, (9 *Barb.* 529;) *Stanton v. Camp*, (4 *id.* 276;) and 1 *Kern.* 200. And the same principle is asserted in 7 *Cranch*, 299, and 2 *Pick.* 352. The principle upon which these cases all rest is, that the contract in question was in fact authorized by the principal, and that a seal was unnecessary to its validity. (22 *Wend.* 335. *Lawrence v. Taylor*, 5 *Hill*, 107. 19 *N. Y. Rep.* 315.) This question is very elaborately discussed, and all the authorities on the subject examined, by Judge Paige in *Worrall v. Munn*, (1 *Selden*, 229,) in which the case of *Randall v. Van Vechten* is also cited with approval. In *Ford v. Williams*, (3 *Kern.* 585,) the same principle is reasserted. In that case the defendant, having an authority by parol, executed a bond of indemnity under seal. The court of appeals held the bond valid as a simple contract. Upon the authority of these cases, the Wayne County Collegiate Institute was clearly liable on the contract described in the complaint in this action, notwithstanding theseals of the defendants were affixed thereto. They were superfluous, not in any way essential to the validity of the contract. *Prima facie* the defendants were lia-

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ble personally on the contract, as was the case in *Taft v. Brewster*, (9 *John.* 334;) *White v. Skinner*, (13 *id.* 310;) and *Brookway v. Allen*, (17 *Wend.* 40;) and in many other similar cases. But the defendants have shown that they were fully authorized in fact to make the contract *a priori*, and that it was ratified in fact by the corporation by making several payments thereon, and otherwise. It is very obviously true, that an agent may make himself personally liable on a contract made for the benefit of the principal, and this he will do if he contracts in his own name, and his principal is unknown. But when the relation of principal and agent is known to exist, and the fact that the agent is acting solely for the benefit of such principal, the agent will not be bound unless the credit is given to him expressly and exclusively, and it was clearly his intention to bind himself personally. (*Stanton v. Camp*, 4 *Barb.* 275. *La Farge v. Kneeland*, 7 *Cowen*, 456. *Story on Agency*, § 261. *Bradford v. Eastburn*, 2 *Wash. C. C. Rep.* 219.) The defendants in this case clearly did not intend to incur any personal liability. They describe themselves as a *building committee*, and covenant in that capacity, and sign by that name. The plaintiff has a complete remedy upon this contract for whatever is due him thereon. The judgment therefore should be affirmed.

[MONROE GENERAL TERM, December 5, 1859. *T. R. Strong, Welles* and *Smith*, Justices.]

CURTIS *vs.* BARNES & HORTON.

Where matters in controversy between parties are mutually submitted to arbitration, and bonds to abide the decision of the arbitrators are mutually executed and delivered, and after the hearing before the arbitrators has been commenced, but before the same has been completed, one of the parties revokes the submission, and thereupon brings an action against the other party to the submission, to recover the claims so submitted, the latter may, in such action, recover by way of counter-claim the damages sustained by him by reason of the revocation, viz. the expenses paid for witnesses, on the arbitration, and such other legitimate expenses as would be recoverable in an action upon the bond.

**A**PPEAL from a judgment entered upon the report of a referee. The action was brought against the defendants as copartners, transacting business as distillers, to recover the price of a steam engine and boiler, with certain castings, mill gearing and other goods, wares and machinery sold and delivered to the defendants; and for work and labor done by the plaintiff upon said steam engine, boiler, castings, &c.; and in transporting the same, and putting it up in the distillery of the defendants. The plaintiff claimed to recover the sum of \$1512.99. The defendants, in their fourth answer, alleged that on or about the 14th day of February, 1857, the plaintiff and defendants entered into and mutually executed a written agreement and contract in writing, reciting the existence of a controversy between the parties relative to an account of the plaintiff against the defendants for a steam boiler, steam engine and machinery, sold and delivered by the plaintiff to the defendants, and matters growing out of the same, and which are the same account and matters specified in the complaint in this action; and by which agreement the plaintiff and defendants did submit the said controversy to the arbitrament of Elmore P. Ross, and did mutually covenant and agree to and with each other, that the award to be made by said arbitrator should in all things, by said parties and each of them, be well and faithfully kept and observed, and at the same time the plaintiff did make, execute and deliver to the defend-

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ants, his certain bond and writing obligatory, under seal, bearing date on the 14th of February, 1857, in the penal sum of \$1000 to be paid by the plaintiff to the defendants, to which payment well and truly to be made the plaintiff bound himself, his heirs, executors and administrators; the condition of which said bond and writing obligatory was, that the said plaintiff should well and truly submit to the decision and award of Elmore P. Ross, chosen arbitrator by said plaintiff and defendants, to arbitrate, judge and determine of and concerning an account of the plaintiff for steam boiler, steam engine and machinery, sold and delivered by said plaintiff to said defendants, and all claims and controversies growing out of the same whatsoever, then existing by and between the plaintiff and defendants, and which said accounts and claims on the part of the plaintiff were the same that are specified in the complaint in this action, and no other or different; and the defendants further alleged, that said plaintiff and defendants appeared before the said arbitrator, at his office in the city of Auburn, in person and by their counsel and with their witness, and the said arbitrator entered upon the hearing of the claims and accounts so submitted to him; and that the plaintiff, on the 21st of April, 1857, after the hearing before said arbitrator had been so commenced, and large expenditures had been incurred by the defendants for attendance before said arbitrator, and for witnesses and counsel before him, to, in and about the hearing of said matters of difference, violated his said agreement and his said bond and writing obligatory, and refused to abide by and perform the award and determination of said arbitrator; whereby the penalty of said bond became forfeited by said plaintiff to the defendants, and the defendants became and were entitled to, and did thereby demand judgment upon said agreement and upon said bond and writing obligatory, for the amount of the penalty of said bond, and for their damages to be assessed in the premises, which said damages amounted in the whole to a large sum of money, to wit, to the sum of \$200, which the defendants claimed to

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recover of the plaintiff in this action ; and the defendants insisted that said submission was a bar to the maintenance of this action on the part of the plaintiff ; wherefore the defendants demanded judgment in their favor for the sum of \$5000, together with costs.

On the trial before the referee, the defendants, for the purpose of establishing the defense thus set up, offered to prove " what expenses were paid for witnesses on the arbitration, and all other legitimate expenses recoverable in an action on the bond." This testimony was objected to by the plaintiff's counsel, and the objection was sustained by the referee, and the testimony excluded. The referee reported that there was due to the plaintiff from the defendants the sum of \$359.99 ; for which sum, with interest and costs, judgment was entered against the defendants, who thereupon appealed to the general term.

*Wm. Porter*, for the appellants.

*D. Wright*, for the plaintiff.

*By the Court*, E. DARWIN SMITH, J. The chief point presented upon this appeal arises upon the exception to the decision of the referee, overruling the proof offered by the defendants in support of the counter-claim set up in their 4th answer. It appears from the answer and reply, that all the matters in controversy between these parties, except so far as relates to this counter-claim, were mutually submitted to arbitration ; that arbitration bonds in the penal sum of \$1000 were mutually executed and delivered, to abide the decision of the arbitrator ; that the parties appeared before the arbitrator and proceeded to the hearing before him ; and that the plaintiff, after the hearing had been commenced and before it was completed, revoked the submission. The defendants claim to recover, by way of counter-claim, for the damages sustained by them consequent upon such revocation ; and they

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offered proof of the expenses paid for witnesses on such arbitration, and such other legitimate expenses as were recoverable in an action upon said bond. This proof was objected to, and overruled by the referee, and the defendants' counsel duly excepted.

The revocation of the submission to the arbitrator worked a forfeiture of the bond, and entitled the defendants to maintain an action thereon, in which they would have been entitled to recover all the costs, expenses and damages which they might have incurred in preparing for such arbitration. (2 R. S. 544, §§ 23, 24. 16 John. 205.) No question seems to have been made in respect to the items of damages or expenses which the defendants claim to recover upon this bond; but the objection is simply that a counter-claim for such damages and expenses was not admissible, and that the defendants were not entitled to recover the same in this action. The referee erred, I think, in his decision overruling the evidence offered. The defendants' claim seems to me to meet precisely all the requisites of a counter-claim, as the same is defined in § 150 of the code. It exists in favor of the defendants against the plaintiff, against whom a separate judgment might be rendered in an action arising out of the cause of action specified. This action arises on contract, and the claim of the defendants arises also on contract, and existed at the commencement of the suit, answering in this particular the precise description of a counter-claim, as specified in the 2d subdivision of § 150. The parties had cross demands which could be settled in one suit. (*Lemon v. Trull*, 13 How. 249. *Davidson v. Remington*, 12 id. 311. *Dobson v. Pearce*, 2 Kernan, 156. *Arndt v. Williams*, 16 How. 244.)

I think, also, that the referee erred in excluding the evidence offered, showing that the defendants refused to take the machinery relating to the mash wheel shaft and have it put up at their expense. This evidence was, I think, admissible, as favoring the defendants' construction of the contract as actually understood and carried into effect, and tending to show that

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this work was not extra; and also, if it were extra work, as limiting the claim of the plaintiff to a recovery for the labor previously done thereupon. I do not think that there was any error committed by the referee in allowing the plaintiff to amend his complaint so as to include the charge in respect to the second boiler. This was within the general scope of the complaint, and it was a fit exercise of the discretion of the referee to receive the evidence in regard to it. It could be no surprise to the opposite party, and no such objection to it was suggested.

The judgment should be reversed and a new trial granted; costs to abide the event.

[MONROE GENERAL TERM, December 5, 1859. *Wells, Smith and Johnson, Justices.*]

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## YOUNG vs. THE NEW YORK CENTRAL RAIL ROAD COMPANY.

Where a contractor, engaged in repairing a bridge upon a rail road for the company, employs men to work thereon by the day, the latter are the servants of the contractor, and not of the company; and between them and the company there is no privity whatever.

If a man, thus employed by the contractor, receives an injury from a passing train while at work upon the bridge, he may maintain an action for damages against the rail road company; provided he can show that the injury was caused by the negligence of the company's servants or agents in charge of the train, without any fault or negligence on his part.

**M**OTION for a new trial, on exceptions, which were ordered to be first heard at a general term. The plaintiff claimed to recover for an injury sustained by him, while at work upon a bridge which was undergoing repairs, on the road of the defendants, on the 12th of August, 1857. He alleged in his complaint, which was sworn to, that he was a carpenter and joiner, and as such the defendants employed him to do certain work and repairs upon the track

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of their said road, and in and upon a bridge on their said road at or near Wende, in the county of Erie; and he alleged the injury to have occurred while so in the *employment* of said defendants. The testimony of the plaintiff was not inconsistent with this allegation. On his direct examination, he says he was employed by Fowler; that Fowler was employed by the defendants. On his cross-examination, he states the manner of his employment, viz. that Gordon called on him to work on the rail road some time in July, and told him what he wanted him to do, and that it was to repair an old bridge at Wende, and he went. It appeared that there were two tracks on this bridge; that the repairs consisted in putting up some new trusses; that the tracks are straight for some miles; that on the occasion of the alleged injury, the plaintiff was on the top of the bridge for the purpose of carrying some materials from the east part of the bridge towards the west; that there was a passenger train approaching from the west, and a gravel train approaching from the east; that as the passenger train was passing off from the bridge, the gravel train was passing on; that the plaintiff was looking down, and stooping over, trying to keep his hat on, and did not hear the bell or whistle of either train: he saw the train coming from the west, but did not see the other, and was hit by the gravel train.

When the plaintiff rested, the counsel for the defendants requested the court to nonsuit the plaintiff, on the grounds, 1. That the plaintiff had failed to show that the injury was occasioned without fault on his part. 2. That the proof showed that the plaintiff was himself negligent, and that this negligence contributed to produce the injury complained of. 3. That the proof failed to show negligence on the part of the defendants. 4. That the proof showed that the plaintiff was in the position of an employee of the defendants, and could not maintain the action, if occasioned even by the negligence of those engaged in running the train. The motion

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for nonsuit was granted by the court; and the judge stated, in granting the motion, that he regarded the case as coming within the rule of those cases holding that the liability to injury was incident to such employment; and that the plaintiff, in accepting such service, must be regarded as having known the use to which the defendants' road was subject; and that he was, therefore, to incur such hazard as might be occasioned by such use; that he must be taken to have contracted with reference to the running of the cars over the bridge during the time of making the repairs. To which ruling and decision of the court, the counsel for the plaintiff excepted.

*O. H. Palmer*, for the defendants. I. The plaintiff was an employee of the defendants, and cannot recover for the alleged injury, if occasioned even by the negligence of the persons engaged in running the gravel train. (*Coon v. Syracuse and Utica R. R. Co.*, 1 *Seld.* 492. *Russell v. Hudson River R. R. Co.*, 17 *N. Y. Rep.* 134. *Sherman v. Rochester and Syracuse R. R. Co.*, *Id.* 153. *Boldt v. New York Central R. R. Co.*, 18 *N. Y. Rep.* 432. *Farwell v. Boston and Worcester R. R. Co.*, 1 *Am. R. W. Cases*, 339. *Hayes v. Western R. R. Co.*, 1 *id.* 564. *Pierce on Railway Law*, 286, 310.) Having alleged that he was an employee of the defendants, and sworn to the fact, he is estopped from controverting that fact now. Besides, the proof shows such to have been his relation to the defendants.

II. The plaintiff, in accepting the service, assumed the liability to injury incident to the employment, and must be regarded as having known the use to which the defendants' road was subject; and that he was therefore to incur such hazard as might be occasioned by such use; and must be taken to have contracted with reference to the running of the cars over the bridge during the time of making the repairs. He was told in the outset what was wanted of him, and what

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he was to do, viz. to repair an old bridge. He knew it supported a double track; that each track was in use.

III. The proof does not show any negligence on the part of the defendants. Such negligence must be affirmatively shown. (*Button v. The Hudson River Rail Road Company*, 18 N. Y. Rep. 248.)

IV. The plaintiff failed to show that the injury was occasioned without fault on his part. (18 N. Y. Rep. 248.) But the proof shows that the plaintiff himself was negligent, and that his negligence contributed to produce the injury complained of. The track east of the bridge was perfectly straight for several miles. He went east on the bridge while the gravel train was approaching from that direction, and could have seen it if he had looked. He neglected to look in the direction of the approaching gravel train, but turned his back upon it when in plain view. His own want of care and prudence was, therefore, the prominent cause of the injury.

*T. Frothingham*, for the plaintiff. The nonsuit should not have been granted. 1. The 1st and 2d grounds of defendants' application for nonsuit, viz. that the proof showed that the plaintiff was guilty of negligence on his part, and that the defendants were not guilty of negligence on their part, is answered by reference to the evidence, which is *entirely* in favor of the plaintiff on these points; and *at all events*, enough a question of fact to be submitted to a jury. 2. There remains then the 3d ground, and the only one on which in fact the nonsuit was ordered by the court, viz. that the plaintiff was an employee of the defendants, and must be deemed to have contracted with reference to the risks, &c. The answer to that is, that he was not an employee. 1st. Because there was no privity of contract between them. 2d. It affirmatively appears that the employee of the defendants was one John Fowler, contractor, and that the plaintiff wrought for *him* by the day. 3d. The plaintiff could not have recovered from the defendants the pay for his services. 4th. The defendants would not

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have been liable to third persons for any negligent act of the plaintiff while at work. 5th. The defendants' contract was not that of an operative on the road, and consequently he was not to run the risk of an operative, but only to work on a structure on the road. 6th. If he is to be presumed to have contracted with reference to any risk, it must have been only such risk as the *nature* of the work indicated; and it appears from the fact that they had taken out the supports of the bridge, and blocked up for the regular trains, so as to enable them safely to cross, that the only risk contemplated was from the running of the regular trains; that it was not contemplated that two trains should run over the bridge at the same time, or that any train should run over the bridge, without blocking. 7th. It cannot be presumed that he contracted with reference to any risk arising from the running of trains on the road, but only with reference to accidents arising from the nature of his own occupation, independent of the road. (3 *Mees. & Wels.* 1. 4 *Metcalf*, 49. 4 *Selden*, 175. 18 *N. Y. Rep.* 432. 17 *id.* 136, 156. 6 *Barb.* 231. 1 *Selden*, 50. 5 *Barn. & Cress.* 560. 12 *Adol. & Ellis*, 737.)

*By the Court*, JOHNSON, J. The plaintiff was nonsuited, as appears from the case, on the ground that his claim fell within the rule of those cases holding that the liability to injury was incident to his employment, and that the plaintiff, in accepting such service, must be regarded as having known the use to which the defendants' road was subject; and that he was therefore to incur such hazard as might be occasioned by such use; and must be taken to have contracted with reference to the running of the cars over the bridge during the time of making the repairs. The case was disposed of, therefore, without regard to the question whether the injury was caused by the negligent acts of the defendants' agents or servants, in the regular course of their employment. Whether the case was properly disposed of upon this ground depends entirely, as I conceive, upon the question whether the plain-

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tiff, at the time of the injury, was in fact the servant or employee of the defendants. The general rule is, that if a servant, while in the employment of his master, by his negligence, does any damage to another, such master shall be answerable for his neglect, because it is the duty of the master to employ servants who are skillful and careful. (1 *Bl. Com.* 431. 2 *Kent's Com.* 259.) "This rule," says *Chief Justice Shaw*, in the leading case of *Farwell v. Boston and Worcester Rail Road Corporation*, (4 *Met.* 49,) "is obviously founded on the great principle of social duty, that every man, in the management of his own affairs, whether by himself, or by his agents or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it. If done by a servant in the course of his employment, and acting within the scope of his authority, it is considered, in contemplation of law, so far the act of the master that the latter shall be answerable *civiliter*. But this presupposes that the parties stand to each other in the relation of strangers, between whom there is no privity; and the action in such case is an action sounding in tort. The form is trespass on the case for consequential damages. The maxim *respondeat superior* is adopted in that case from general considerations of public policy." But this maxim has been held not to apply to the case of an injury to a servant or employee, occasioned by the negligence of another servant or employee, of the same master. The reason assigned for this exception is, that the relation between the employer and the servant rests in contract only, and that there is no implied contract, on the part of the employer, of indemnity to the servant, against injuries, in the course of the business in which the latter is engaged.

The rule established in such cases from considerations of justice, as well as policy, is, that he who engages in the employment of another, for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of

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such services, and in legal presumption the compensation is adjusted accordingly. (*Farwell v. Boston and Worcester Rail Road Corporation, supra.*) This rule has been followed in several cases in our own courts, and is the settled law of this state. (*Coon v. Syracuse and Utica Rail Road Co.*, 1 *Seld.* 492. *Russell v. Hudson River Rail Road Co.*, 17 *N. Y. Rep.* 134. *Sherman v. The Rochester and Syracuse Rail Road Co.*, *Id.* 153. *Boldt v. The New York Central Rail Road Co.*, 18 *id.* 432.)

The ground of exemption of the master, in all these cases, is the privity of contract between him and the person injured, from which the law presumes an agreement between them, for a compensation equal to the risk or peril of the service. If, therefore, the plaintiff in this case was not, in any legal sense, the servant or employee of the defendants, but was the servant or employee of another, and there was no privity between him and the defendants, the decisions referred to do not apply, and the defendants must be liable upon the general rule, to the plaintiff, the same as to any other stranger. The defendants can claim no benefit or exemption from a contract made between the plaintiff and another party, whatever risks he may have assumed, as between himself and his employer. It is claimed, however, on the part of the defendants, that the plaintiff was their servant or employee, and that having alleged in his complaint that he was such servant or employee, and verified the complaint by his oath, he cannot now deny that such was the character in which he was employed at the time of the injury. It is so alleged in one count or cause of action in the complaint, and not in the other. In the first count or cause of action it is merely alleged that the plaintiff was lawfully upon the bridge at the time of the injury. But the defendants have, by their answer, put both allegations in issue. They deny that he was lawfully there, and also that he was their servant or employee. And the answer, as well as the complaint, is duly verified. The pleadings, therefore, determine nothing in regard to the question,

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and the fact must be determined from the evidence before the court when the plaintiff rested. From the evidence it appears that the plaintiff, at the time he received the injury, was at work for Fowler, by the day, in repairing the bridge, and that Fowler was a contractor with the defendants. This is all that appears. If Fowler was a contractor with the defendants to do this job, he was not, in any legal sense, their servant or employee, and the men employed by him to do the work certainly stood in no such relation to the defendants. They were his servants exclusively, and between them and the defendants there was no privity whatever. And I think it cannot be doubted, that had one of the persons employed by the defendants to run their trains been injured by the negligence of one of the persons so employed by Fowler, he would have been answerable for the negligence. It could scarcely be pretended, in such a case, that the negligent, and the injured, employees were, both, servants of the same employer. And the rule must be reciprocal. There is a wide and obvious distinction between a contractor or jobber, and a mere servant or employer, of the person who lets the contract. The latter could never be held responsible for the negligent acts of the former as for those of his servants, for the simple reason that none of them stand in the relation of servant to him. In the case in 4 *Metcalf*, (before cited,) the learned justice who delivered the opinion, puts the case of a rail road owned by one set of proprietors whose duty it was to keep it in repair, and have it at all times ready, and in a fit condition for the running of cars, taking a toll, and the cars and engines owned by another set of proprietors, paying toll to the proprietors of the road, and receiving compensation from passengers for their carriage; and the engineer of the proprietors of the cars receiving an injury from the negligence of the switch-tender of the proprietors of the road. In such a case, the opinion is expressed that the proprietors of the road would be liable to the engineer. And this is put upon the ground, that as between the engineer, employed by the proprietors of the

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engine and cars, and the switch-tender employed by the corporation, the engineer would be a stranger, between whom and the corporation there could be no privity of contract.

That principle would obviously control this case. The plaintiff being the servant of Fowler, stood in no relation of privity to the defendants. As to them he was a mere stranger, for whose conduct they were in no respect responsible, and to whom they owed the same duty which they owed to any other stranger. The same principle has been recently established in the court of appeals in this state, in the case of *Smith v. The New York and New Haven R. R. Co.*, (19 *N. Y. Rep.* 127.) It follows from this that the plaintiff was improperly nonsuited, if the evidence tended to show that the injury was caused by the negligence of the defendants' servants in charge of the train which came in contact with the plaintiff at the time such injury was inflicted. The plaintiff was lawfully there, engaged in the work he was employed to perform. The defendants must be presumed to have known that the plaintiff and others were there employed, as the structure was part of their road, and they owed the plaintiff, and others similarly situated, a duty to observe due care and caution in running their trains, so as not needlessly to place them in peril.

The evidence tends to show that the regular passenger train, and a gravel train, which had not before passed that place while the plaintiff had been employed there, met upon the bridge, and that while the passenger train gave the usual signal of its approach, ringing the bell and blowing the whistle, the gravel train came on without giving any such warning, and struck the plaintiff while he was observing, and in the act of avoiding, the passenger train.

Whether the running of this unusual train in this manner, at this place, was, under all the circumstances, negligent or otherwise, was clearly, as it seems to me, a question of fact for the jury; as was also the question whether the plaintiff,

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situated as he was, was free from fault, or whether his own want of care did not contribute to the injury.

This question, as has been seen, was not passed upon as a question of law even, and did not enter at all into the considerations which controlled in the disposition of the case. I am of opinion, therefore, that a new trial must be granted, with costs to abide the event.

New trial granted.

[MONROE GENERAL TERM, December 5, 1859. *T. R. Strong, Welles and Johnson*, Justices.]

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ROSS vs. CURTIS.

It is an elementary principle, that where one person receives money for another, and the law makes it the duty of the receiver to pay it to the person for whom or for whose use it is received, a promise to pay it in accordance with the duty, is always presumed, and a privity established, as matter of law, between the parties. *Per* JOHNSON, J.

Where money is directed, by a statute, to be paid by a county treasurer to the supervisor of a particular town, whose duty it is to apply the money thus received, in payment of certain bonds issued by the town, such supervisor, after receiving the money, holds it as trustee or depositary for the bond holders, and is liable to them in an action for money had and received.

And in such an action, the defendant will not be permitted to go behind the payment of the money to him, to question the validity of the bonds.

THIS action was brought to recover the interest due upon five of the bonds, for \$1000 each, issued by the supervisor and rail road commissioners of the town of Sterling, Cayuga county, under a statute passed June 23, 1851, and an amendment thereof, passed July 21, 1853, (*Laws of 1851, p. 544; Laws of 1853, p. 1137,*) of which bonds the plaintiff was the holder. The first mentioned act, by its first section, authorized the supervisor of the town of Sterling, and Robert Hume and William Wyman, who were appointed

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 ROSS v. CURTIS.
 

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commissioners to act in conjunction with said supervisor, to borrow the sum of \$25,000 on the credit of the town for a term of years, and to execute therefor, under their official signatures, a bond or bonds, on which the interest should be made payable on the first of March in each year, and for the successive years after the first of March, 1852. And the moneys thus borrowed were directed to be paid over to the president and directors of a certain rail road company therein mentioned, to be expended by said company in grading and constructing its rail road. The fourth section of the act, after directing how the money shall be levied, collected and paid over to the treasurer, proceeds: "which sum shall be paid by the treasurer of Cayuga county, at his office, to the supervisor of the town of Sterling, on or before the 25th day of February, *which sum shall be applied by said supervisor in payment on the bonds, on or before the first day of March succeeding.*" The board of supervisors of Cayuga county caused the money required to pay the interest upon the bonds for the year 1857, to be levied and collected. On the 25th day of February, 1857, the defendant (he being then supervisor of Sterling) applied to the treasurer, and received from him money sufficient to pay the interest upon all of the twenty-five bonds, and thereupon gave him two receipts, each for the same amount, and in the following form:

"\$875.

Cayuga County Treasurer's Office, }  
 Auburn, February 25, 1857. }

Received from Horace T. Cook, treasurer of the county of Cayuga, eight hundred and seventy-five dollars, to apply on the moneys collected in the town of Sterling, *to pay the interest on the bonds issued by said town.*

(Signed)

HIRAM C. CURTIS,

*Supervisor of Sterling."*

The plaintiff demanded of the defendant payment of the interest due upon his five bonds, which was refused, and this

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Ross v. Curtis.

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action was thereupon brought to recover the same. The action was tried at the Cayuga circuit, and the plaintiff nonsuited. Upon appeal the nonsuit was set aside, the general term unanimously holding that the action for money had and received was the appropriate remedy. Upon a re-trial, judgment was rendered for the plaintiff for the interest due, with interest thereon from the time of the demand. From that judgment an appeal was taken by the defendant to the general term.

*D. H. Marsh*, for the appellant.

*Wright and Pomeroy*, for the plaintiff.

*By the Court*, JOHNSON, J. The action is for money had and received by the defendant, to the use of the plaintiff. The right of the plaintiff to maintain this action is entirely settled, so far at least as this court is concerned, by an unanimous decision in the case of *Murdock v. Aikin*, (29 Barb. 59.) It cannot be necessary to review the grounds of that decision. The principle is elementary that where one person receives money for another, and the law makes it the duty of the person thus receiving it to pay it to the person for whom or for whose use it is thus received, a promise to pay it in accordance with the duty is always presumed, and a privity established as matter of law, between the parties. It is unnecessary to cite authorities for so plain and well established a proposition. The defendant had no right to receive the money for any purpose other than to pay it over to the plaintiff and others similarly situated; and his receipt to the county treasurer shows that he received it for that purpose and no other. His duty to pay the moneys thus received, in satisfaction of the bonds, is prescribed by statute. (*Session Laws of 1857*, p. 546, § 4.) After thus receiving the money, he held it as trustee or depository, for the plaintiff and other bondholders, and should not be permitted to go behind the payment of the

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 Lowenstein v. Chappell.
 

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money to him, to question the validity of the bonds, in payment and satisfaction of which the money has been thus advanced by or collected from the obligors. The statute constituted him the official agent of the plaintiff and other bondholders, to receive the money, when collected and paid into the county treasury, and pay it over to them. But if he could be allowed, with the plaintiff's money thus in his hands, to question the validity of the bonds, that question is fully settled by the decision of this court in the cases of *Gould v. The Town of Venice*, and *Starin v. The Town of Genoa*, (29 Barb. 442.) I find nothing in this case to distinguish it at all in principle from the other cases decided by us, before referred to. The judgment must therefore be affirmed.

[MONROE GENERAL TERM, December 5, 1859. T. R. Strong, Smith and Johnson, Justices.]

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 LOWENSTEIN vs. CHAPPELL.
 

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The law will not allow a party, in an action for the breach of a contract, to recover, as damages, losses which he has sustained in the performance of his contracts with others, even where such contracts are founded, in some measure, upon the contract alleged to have been broken.

On the 20th of February, 1857, the defendant agreed to rent to the plaintiff a store, for the term of one year from the 1st of April then next. Relying upon this agreement, the plaintiff sold to M. the lease of a store he then occupied, agreeing to give possession on the 2d or 3d of April; and M. suffered the plaintiff to occupy a room in the store, for his goods, in the mean time. For the purpose of protecting his goods from damage while the store was undergoing repairs, the plaintiff packed them up, and they sustained some damage in consequence of the packing. In an action to recover damages of the defendant, for a breach of his agreement; *Held* that the packing of the goods not having been done for the purpose of removing them to the store of the defendant, nor being necessary, for that purpose, the plaintiff could not recover for any injury to the goods occasioned by the packing thereof; such injury not flowing directly, or necessarily, from the breach by the defendant, but from the plaintiff's agreement with M. to give up to

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Lowenstein v. Chappell.

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him the store in which the goods were situated, and that they should in the mean time occupy a particular space therein.

*Held* also, that the plaintiff was not entitled to recover *interest* on the value of his entire stock of goods which he intended to put into the defendant's store, during the time he was by the defendant's breach of contract prevented from exposing them for sale.

**M**OTION for a new trial, founded on a case and exceptions. The complaint alleged that on the 20th day of February, 1857, the defendant agreed to rent to the plaintiff a certain store, No. 74 State street, in Rochester, for the period of one year from April 1, then next, for the sum of \$1000. That the plaintiff was, at the time of this agreement, in possession of a store, No. 67 State street, under a lease for five years from September 1, 1856; and after this agreement with the defendant, and relying thereon, he sold and assigned the lease to one Minges, and agreed to give possession April 1, 1857. The defendant refused to execute a lease or give possession of No. 74. After the 20th day of February, 1857, and before the 1st day of April, the plaintiff bought a large stock of goods, which he designed to keep in the store of the defendant, and brought them to Rochester at great expense. That by reason of being deprived of said store, he was prevented from selling the goods in said store in the ordinary way of retail trade, and making large profits; but was obliged to, and did, sell the same at auction, and at wholesale, whereby he sustained great damage. He was also thrown out of business, with a stock of goods on hand, and put to large expense in and about the same, and in securing another store for the same; and deprived of large profits which he otherwise would have made by the sale of the same, during a long time, and before he was able to secure another store for the same. The answer was a general denial. The plaintiff, on the trial, proved that he agreed to rent his store to one Minges, and give him possession thereof on the 3d or 4th day of April, but Minges suffered the plaintiff to occupy a room in the store. That the plaintiff, in order to put his goods therein, and to protect

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them from damage by the repairs which Minges made, was obliged to pack the goods. That in consequence of packing the goods, they were mussed up, and some ruches and flowers had to be replaced.

Exceptions were also taken to the charge of the judge, and to his refusal to charge as the defendant requested. The jury found a verdict in favor of the plaintiff for \$50.

*Wm. F. Cogswell*, for the plaintiff.

*Geo. F. Danforth*, for the defendant.

*By the Court*, JOHNSON, J. Whether the plaintiff was entitled to recover, for the injury happening to the goods, in consequence of packing them, must depend upon the question whether such injury was the direct and necessary consequence of the defendant's neglect or refusal to perform his agreement. The general rule is that the party injured by a breach of a contract is entitled to recover all his damages, including gains prevented, as well as losses sustained, provided they are certain, and such as might naturally be expected to follow the breach. (*Griffin v. Colver*, 16 N. Y. Rep. 489.) The goods injured, were packed not for the purpose of removing them to the store which the defendant had agreed to lease to the plaintiff, but for the purpose of getting them out of the way of the tenant to whom the plaintiff had sold his lease of the store in which they were then situated, and where they had been previously kept for sale, while such store was undergoing repairs, in order to prevent them from being injured by the repairs, and also to place them in the room, in the same store, which the plaintiff was permitted to occupy by the new occupant. The plaintiff testifies that they had to pack the stock in *such space* as Minges, the new occupant, allowed them to occupy. In consequence of the packing, as he says, "the goods were mussed up, and some ruches and flowers had to be replaced." From this cause, he estimated that the goods had

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been depreciated in value fifteen per cent. It is apparent, from the plaintiff's statement, that packing would not necessarily injure the goods, but that the injury arose rather from their being packed in the confined space allotted by the occupant of the store and accepted by the plaintiff. No packing would have been necessary for the removal of the goods to the defendant's store, which was convenient to the one in which the goods were packed. As they were not packed for the purpose of such removal, I do not see how the defendant is responsible, either for the expense of packing, or for any damages happening by reason of such packing; whether the manner in which it was done was proper or improper. Had the packing been necessary, for the purpose of removal to the defendant's store, and been done with that view, then the plaintiff might have recovered the expense of such packing, within the principle established in the cases of *Holmes v. Seely*, (17 Wend. 75,) and *Giles v. O'Toole*, (4 Barb. 261.) But no case has gone so far as to hold that under such circumstances the plaintiff might recover the expense of removing, or preparing to remove, to some other place; much less for an injury to his goods occasioned by such removal, or by a preparation therefor. The difficulty, in the way of such a recovery, would be that the injury could not be said to flow directly, or necessarily, from the breach, but more directly from some other cause. So here, the injury was occasioned by the packing, and that was rendered necessary, not directly from the defendant's breach, because no packing was necessary, or could have been, in performing that agreement; but directly and immediately from the plaintiff's agreement to give up to Minges the store in which the goods were situated, on the 1st of April. He could not perform his agreement with Minges without removing his goods. And the packing was the direct result of an agreement between the plaintiff and Minges that the goods should be permitted to occupy a particular space in that store. With this agreement, and the subsequent packing, the defendant had nothing to do. The

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plaintiff saw fit to make that arrangement with the new occupant, for his own convenience, and to avoid a breach of his agreement with such occupant. This is, surely, a result which could not naturally be expected to follow such a breach. Under no circumstances could the plaintiff be allowed to recover, of the defendant, the damages arising from such a cause, without first showing that the goods could not have safely been removed, and stored, in another place, without such packing, until he had secured a suitable place for his business. But, even then, I do not see how he could recover, because the injury would still flow only indirectly and remotely from the breach. The law will not allow a party, in an action for the breach of a contract, to recover as damages losses he has sustained in the performance of his contracts with others, even where such contracts are founded in some measure upon the contract alleged to have been broken. (*Masterton v. The Mayor &c. of Brooklyn*, 7 Hill, 61.)

That is precisely what the plaintiff was allowed to recover here. It was damages he sustained in getting his goods out of the way of Minges, and thus performing his agreement with him, and not a loss sustained in endeavoring to perform his agreement with the defendant. I am of opinion, therefore, that the charge in respect to the allowance of this item was erroneous.

In respect also to the item of interest, which the jury was instructed to allow, I am unable to perceive upon what principle the plaintiff was entitled to it. The defendant, by his breach, may have deprived the plaintiff of the opportunity of exposing his goods for sale for the period of fifteen days. But why should the plaintiff recover interest on the value of his entire stock for this? Was that in any sense the measure of his loss? He might have sold a portion of his stock in that time, but it is hardly to be supposed he could have disposed of the whole on the first day when, according to the charge, the interest should commence. If he had sold a portion of it in this time, he might have realized a profit on the portion thus

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*Magee v. Badger.*

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sold, but the allowance of interest on the value of the whole stock does not seem to meet or in any respect to measure or satisfy the injury arising from this loss of opportunity to sell. On the contrary, it seems to me a species of compensation entirely inappropriate to the nature of the injury sustained. Whether the goods, aside from their injured condition, actually sold for more or less, after the fifteen days, than they might have been sold for within that period, does not appear. The plaintiff had the entire possession and control of the goods during all this time. The defendant neither converted them to his own use nor sought to do so. There has been no loss of this kind to the plaintiff, and there is no ground, that I am aware of, upon which interest can be charged upon the defendant in such a case. I think no case can be found to sanction it, and that it is unjust in principle. The charge was therefore erroneous on both grounds, and there must be a new trial, with costs to abide the event.

[MONROE GENERAL TERM, December 5, 1859. *T. R. Strong, Welles and Johnson*, Justices.]

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*MAGEE vs. BADGER & POTTER.*

Under the act of April 1, 1854, authorizing the Buffalo, Corning and New York Rail Road Company to receive subscriptions for preferred stock and to issue such stock to subscribers therefor, and requiring such subscribers to pay the par value of such shares as they are authorized to take, "in such manner as the board of directors should direct at the time of subscribing," the directors had the power to take from a subscriber his promissory note payable in a year, in payment of his subscription for preferred stock.

A note thus given in payment of a subscription for preferred stock, is valid in the hands of the company, or of a third person to whom it is regularly transferred, in part payment of a demand due him from the company.

A second note, given by such subscriber, in settlement of an action brought to recover the amount due upon the original note, is also valid; it having a good consideration, to the amount due upon the first.

A party giving a note, under such circumstances, would not be permitted to set up as a defense to it, the invalidity of the first note; unless he could

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show that he was in some way deceived and defrauded in the settlement.  
*Per JOHNSON, J.*

If the maker is defrauded, and he seeks to repudiate the second note on that ground, he must restore the old note, given up on the settlement, and place the holder in the same situation in which he stood at the time of the settlement.

Where, in an action on a promissory note, the judge charged the jury that if the plaintiff took the note with notice of facts constituting a defense thereto, it would be void in his hands; and further, that if he had knowledge of facts or circumstances which should have prompted further inquiry that might have led to a knowledge of the facts, the note would, for that cause, also, be void; *Held* that the latter clause of the charge went beyond the settled rule of law, in regard to the validity of negotiable paper in the hands of a holder for a valuable consideration.

Where there is but one exception to the refusal of the judge to charge as requested, the party excepting must, in order to sustain the exception, show that every proposition embraced in the request to charge is tenable.

If either proposition is erroneous, the exception fails, although a portion of them were sound in point of law.

**M**OTION for a new trial, on a case and exceptions. The complaint was upon a promissory note, made on the 28th of January, 1857, by the defendant Badger, whereby, for value received, he promised to pay, six months after the date thereof, \$350, with use, to the order of Hiram Potter, at the Steuben County Bank; and the plaintiff alleged that the defendant Potter duly indorsed the said note, and the same was duly transferred and delivered to the plaintiff. That when the said note became due it was duly presented for payment at the Steuben County Bank, and payment thereof was duly demanded, but the same was not paid, whereof due notice was given to the defendant Hiram Potter. And the plaintiff averred that he was still the owner and holder of the said note, and that the defendants were indebted to him upon the same in the sum of \$350 besides interest, for which sum, with interest, &c. the plaintiff demanded judgment.

The defendants by their answer admitted the making of the note by the defendant Badger, and the indorsement thereof by the defendant Potter, as stated in the complaint. They also admitted that it was duly presented for payment when due, and

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that the same was not paid, and that due notice thereof was given to the defendant Potter as stated in the complaint, and that the plaintiff was the owner and holder of said note. For a further answer to the complaint, the defendants alleged, that on or about July, 1854, the defendant Harvey P. Badger was the owner of nine shares of the capital stock of the Buffalo, Corning and New York Rail Road Company, a rail road corporation duly chartered by the laws of this state. That by an act of the legislature, passed April 1st, 1854, the directors of the said corporation were authorized to increase the capital stock of the company by the addition of not exceeding 4666 shares, of the par value of \$100 each; and for the purpose of carrying into effect the provisions of the said act, the directors were authorized to issue the said 4666 shares of new stock in the company, and that such new stock should be called, and should by the provisions of the said act in fact be, preferred stock. And it was further provided in and by the said act, that the holders of the then present stock might subscribe for the new stock, in the proportion of one share for every three shares of old stock held by them, they paying the par value of \$100 for such new stock, and on delivering up their certificates of old stock, (the directors having first complied with the requirements contained in the sixth section of the said act,) they should receive in lieu of every three shares of old stock and share of new stock a certificate of four shares of preferred stock; provided that an amount not exceeding one half of such new stock so taken by such stockholder should be required to be paid in by him within three months, and the remaining half should be paid within six months after the acceptance of the said act by the stockholders, as provided for in the 6th section of the said act. It was further provided in and by the 6th section of the said act, that the directors should not issue any of the new stock until the provisions of the act should be accepted by a vote representing at least two thirds of the stockholders of the company, at a stockholders' meeting specially convened for that purpose; as by reference to the

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said act entitled "An act to increase the capital stock of the Buffalo, Corning and New York Rail Road Company," passed April 1, 1854, will more fully and at large appear. And the defendants further alleged, that at a stockholders' meeting specially convened for that purpose, held in pursuance of the 6th section of the said act, on or about the --- day of -----, 1854, the provisions of the said act were duly accepted by a vote representing at least two thirds of all the stock of said company. And that the said Buffalo, Corning and New York Rail Road Company, at the time of the passage of the said act, and at the time of the acceptance of the provisions of the act by the stockholders of the company, and at the time of giving the note hereinafter mentioned, had not constructed that portion of their road between Buffalo and Batavia, and that the completion thereof was essential to the prosperity of the remaining portions of said road, and was of great importance to, and would greatly enhance the value of, the stock of said road. That after the passage of the said act and after the acceptance thereof as aforesaid, one Frederick Davis, jun. who was the secretary and agent of the company, and the plaintiff who was the president of the company, on or about the month of July, 1854, in order to induce the defendant Badger to change his nine shares of stock in the said company into preferred stock, falsely and fraudulently represented to him that the directors of the company were going on immediately to complete their road from Batavia to Buffalo, and that such completion would greatly enhance the value of the stock of said company, and that he, the said Davis, was authorized by the company to take the note of the said defendant, at one year from the date thereof, and change his stock to the new preferred stock of the company. That all the money raised by preferred stock was to be, and by the company should be, applied to the completion of the said road to Buffalo. That the defendant Badger, relying upon such false and fraudulent representations, gave to Davis, as such secretary and agent of the company, his note for \$300, payable

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in one year from the date thereof, for the shares of the new stock provided for under and by virtue of the said act. That all the representations so made by Davis and the plaintiff were false and fraudulent, and known by them to be so, at the time the same were made. And that the defendant Badger, at the time the said note became due, refused to pay the same. That at that time the defendant Badger was the holder and owner of 87 shares of the stock of said company, 78 of which had not been preferred. That on or about the 28th day of January, 1857, the said Frederick Davis, jun., he still being the secretary and agent of the said company, fraudulently pretending that he was authorized by the company and by law to make the whole of Badger's stock preferred under the said act, undertook and agreed with the said defendant that if he would give his note for \$350 in the place of the said note hereinbefore mentioned, payable in six months from date, indorsed by the defendant Hiram Potter, the said company would prefer the whole of the stock of the defendant Badger, and issue to him in lieu of 87 shares of stock, 90 shares of the new preferred stock. That thereupon the defendant, relying upon the truth of such pretense, gave to the said Davis his note for \$350, payable six months from the date thereof, and the defendant Potter indorsed the same, and the defendant Badger, at the same time, surrendered to Davis his certificates for his 87 shares of old stock and received from the said Davis, acting as and for the said company, 90 shares of the new preferred stock of the said company. Whereas in truth and in fact the said Davis was not authorized by the company, nor by the law, nor was the said company authorized by law, to issue to the defendant Badger the said 90 shares of preferred stock, all which Davis well knew at the time of taking said note and of issuing said new stock to the defendant Badger; and the said 90 shares are, and were, therefore entirely valueless, in the hands of the defendant Badger. That the said note last mentioned is the same note mentioned and referred to in the complaint in this action. And the defendants further averred, on

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information and belief, that the plaintiff in this action was not a bona fide holder of the said note, and that he did not receive the same in the usual course of trade and for value, and that he received the same with a knowledge of all the facts connected with the making thereof, or under such circumstances as in law would charge him with such knowledge.

The action was tried at the Steuben county circuit, in October, 1858. The making of the note being admitted by the pleadings was read in evidence, and there appeared to be due thereon \$392.66. *H. P. Badger*, one of the defendants, was sworn as a witness for the defendants, and testified as follows: "I am the maker of the note in question. In July, 1854, I attended a meeting of the stockholders of the Buffalo, Corning and New York R. R. Co. at Leroy. I was a stockholder, and the meeting was with a view to consult in regard to preferring the stock under the law of April 1st, 1854. I gave my note for \$300, payable in one year. It is destroyed. It was taken up and destroyed when the note now in suit was given. The note was payable to Davis as the secretary of the company, and as the property of the company. I think it was dated 28th July, 1854. Mr. Magee was present at the meeting when I gave the note. I had a conversation with him at the meeting. I told him that a gentleman who was sitting by me by the name of Bixby would prefer his stock if I would prefer mine. I had 87 shares of the old stock, at \$100 per share. I told Magee that I was not able to prefer my stock, and had not thought of doing so. He wanted I should do so and get Bixby to prefer his. I told Magee if the company would give me a year's time, I might prefer a portion of it. He said they would take the note for a year, and wanted me to get Bixby to prefer his. He directed Mr. Davis to draw a note for \$300, payable in a year, and I signed it. The note was to prefer nine shares of my stock. I never received my certificate from the company, preferring the nine shares for which that note was given; but understood it was put to my credit on the com-

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pany's books. I never received from the company any preferred stock until the giving of the present note. The note was made payable to Davis as secretary of the company, and handed over to him as the property of the company. It was not paid at maturity. It was sued by Mr. Davis soon after it became due. John Ostrander was his attorney. I put in a defense. The action on the note being at issue in the supreme court, it was referred by an order of the court to Washington Barnes as sole referee. It was noticed for hearing. Before the hearing, a meeting of the stockholders of the company was held at Avon, in December, 1856. At that meeting I saw Mr. Davis, and we talked about settling the suit. After it had been stated at the meeting that the preferred stock would be worth five per cent more than the old stock, I proposed to settle if he would prefer my whole stock. Davis told me he could not do it. Davis said he thought it would be illegal to prefer my whole stock, but said he would think of it and talk with Mr. Ostrander and let me know. Some time after that Mr. Ostrander called on me, and said Mr. Davis had concluded to do as we had talked; thereupon Mr. Ostrander and myself settled the suit. The agreement was, that I should surrender up my certificate for the 87 shares of the old stock and give my note, indorsed by Hiram Potter, and was to receive 90 shares of the preferred stock, the suit to be discontinued and my old note given up. I gave Mr. Ostrander the note now in suit, and my certificates for the 87 shares of the old stock, for which he was to return me the 90 shares of preferred stock and my old note, and discontinue the suit. A few days after this, I received from Mr. Davis a certificate of preferred stock." The defendants' counsel insisted that the note being void in its inception, the onus of showing that the plaintiff received it in good faith, in the usual course of trade and for value, was upon the plaintiff, and that unless this was shown, the plaintiff was not entitled to recover. The court ruled otherwise, and the defendants' counsel excepted. *F. Davis*, the secretary of the

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company, was examined by defendants, and testified: "The note in suit was taken by me individually, and not as secretary of the company. I negotiated this note to Mr. Magee [the plaintiff] about three months after it was given. I had borrowed of Magee previous to that time about \$400, for which he held my note, and as collateral my draft on and accepted by the treasurer of the company, for \$500 due me on my salary as secretary. When I let Magee have this note, he indorsed the amount of it on the note he held against me, and gave me up the draft he held as collateral. The draft has since been paid to me. I did not tell Magee any thing about the note; only asked him if it was good. When the first note was given by Badger, I did not issue to him any preferred stock, but I gave him a certificate that when the note was paid he would be entitled to 12 shares of preferred stock. I did this as secretary of the company. The old note was the property of the company. I took the first note on my salary by the consent of Mr. Miller, president, and it was charged to me in my account on the books of the company. I cannot say it was by the act or directions of the directors. I took it, as we took our pay in other things, by the assent of the president. I had sued the old note, and the suit was settled, and this note was taken for the old note with interest and part of the costs of that suit. I think I paid part of the costs myself. The conditional certificate was returned by Badger when the new note was given. I never received any thing for the certificate of 90 shares of preferred stock but the note in suit. The stock was issued after a receiver for the road was appointed. Mr. Miller, the president of the company, was appointed the receiver. The road was insolvent. I was secretary of the company as long as it existed. The first note was not in the hands of Mr. Magee, or the bank. It was never out of my possession. I took it with the knowledge of the president of the road. The suit on that note was settled before the scrip for 90 shares was

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issued." Much other testimony was given by the defendants, to substantiate the defense set up in the answer.

The testimony being closed, the defendants' counsel insisted as a matter of law, and requested the court to charge the jury, that the plaintiff was not entitled to recover, because,

1st. The note was void, the company having no right under the law of 1854 to take a note at all for the preferred stock.

2d. The company had no right or authority to take a note payable in a year, for the preferred stock.

3d. The company never, as a matter of fact, issued any preferred stock to the defendant Badger, for the note first given.

4th. The plaintiff was privy to the giving of the first note, and advised and consented to it, he being a director of the company at the time.

5th. The defendant Badger refused to pay the first note, and the plaintiff knew it. He was sued, and defended, and the plaintiff knew it. The note now in suit was given in settlement for, and grew out of, the first note, and the plaintiff knew it, for he advised the settlement and the taking of the new note.

6th. The plaintiff was therefore put upon inquiry, and was in law chargeable with knowledge of the true consideration of the present note.

7th. The present note is void, as being given in fraud of the stockholders and contrary to the provisions of the statute of 1854. It was given in pursuance of a corrupt agreement embracing a fraudulent issue of preferred stock, and is therefore void.

8th. That the plaintiff being a director and officer of the company was chargeable with knowledge of its secretary's act in issuing its stock to Badger, and the circumstances under which it was issued, and the consideration upon which it was issued.

9th. That the plaintiff was not, therefore, a bona fide holder of the note.

The court declined to charge the jury as requested, and the defendants' counsel excepted. The court did charge the jury as follows: That the first note was a valid note. That the

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company was authorized by law to take notes for preferred stock, payable in a year or any longer time. To this the defendants' counsel excepted. The court further charged the jury that the second note, the one now in suit, was void as between the parties to it; that the evidence showed that the plaintiff received the last mentioned note before its maturity, and parted with value sufficient at the time, so far as that was concerned, to constitute him a bona fide holder for value. He relinquished the collateral security he held for his debt against Davis, and indorsed the amount of this note upon his note against Davis. To this the defendants' counsel excepted. The court further charged the jury that if the plaintiff had, at the time he purchased and received the note in question of Davis, actual knowledge or notice of the facts which rendered it void in the hands of Davis, it was void in the hands of the plaintiff, and the defendants were entitled to a verdict. The court further charged the jury that if the plaintiff had notice or knowledge of facts or circumstances, such as ought reasonably to have excited the suspicions of a prudent man and led him to make further inquiries which would have disclosed the illegality of the note, he was chargeable with the notice of such illegality and could not recover; that the illegality of the note upon which the plaintiff claimed to recover, consisted in the contract to issue, and the actual issuing, of the \$9000 of preferred stock. These were the only facts proved which injuriously affected the validity of the note. To this the defendants' counsel excepted. The court then submitted it to the jury to find from the evidence whether the plaintiff received the note in question with notice or knowledge of such facts; whether, if he had not such notice or knowledge, he had notice or knowledge of facts or circumstances which should have prompted further inquiry, and which would have led to a knowledge of the illegality of the note. In either case the defendants were entitled to a verdict in their favor. The plaintiff knew that the first note had been given, and that Badger had been sued on it, and that the action had been depending

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some time, and was referred to a referee. He advised a settlement, by giving time and getting additional security. The action was settled and the present note taken. It is not shown here that any legal defense existed to the first note. To this last the defendants' counsel excepted. If any such defense were shown on the trial to have existed, the plaintiff would have been chargeable with notice of it. But no such evidence had been given, and the question in this connection was, whether there was any fact or circumstance brought to the knowledge of the plaintiff to lead him to suspect the existence of the unlawful transaction between Davis and his attorney Ostrander, and Badger. That the plaintiff denied as a witness that he had any knowledge of it until the answer in this action was served. The jury rendered a verdict in favor of the plaintiff for \$392.66.

*Hammond & Ferris*, for the defendants. I. The Buffalo, Corning and New York Rail Road Company had no power under the act of 1854 to receive notes payable in a year, for preferred stock. We insist that the meaning and intent of the proviso of section two is, that "an amount not exceeding one half of the amount of such new stock, shall be required to be paid within three months." We say this because, 1. It is clearly the intention of the law that *some* portion of "the amount" shall be required to be paid within three months. 2. It is equally clear that the legislature intended to confer on the *company* the *power* to give a credit of three months for one half, and six months for the other half of "the amount," and that this *power* did not, in the view of the framers of the law of 1854, exist before.

II. However bungling the language of the proviso may be, it is evident that the legislature understood the provision to be permissive—an enabling clause rather than one limiting the powers of the company—that is to say, the proviso was intended to *permit* the company to accept of subscriptions payable one half in *three* and one half in *six* months. (1.) Else why

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declare that some amount not exceeding one half of the new stock, "*shall be required* to be paid by him within six months?" (2.) Else again, why declare that "the other half *may be* required to be paid within six months."

III. If such is not the true meaning of the act, then the subscriptions are without limitation as to time of payment, excepting only that they shall *not* be payable in less than three and six months, and *may* be payable in one, five, ten, twenty, or a hundred years hence.

IV. For these reasons we say that the first note was taken without authority, and was therefore void.

V. The company had no power to take a subscriber's note in payment of his subscription to the preferred stock, at all. (1.) There is no such power contained in, or conferred by, the charter of the company. (2.) It can take no such power by implication, for such power is not necessary to the carrying out or perfecting any express grant. (3.) The subscriptions are to be cash subscriptions. This is evidenced by the manifest object and purpose of the law of 1854, which was to enable the company to increase its capital stock, in order to complete their road and pay off their debt, and by the fact that no other kind of subscription would accomplish the object. And for the further reason that any other than cash subscriptions, by giving preference to the new stock, would operate as a fraud upon the original stockholders.

VI. The first note being void, and the plaintiff having knowledge of the facts which made it so, and being himself a participator in them, the charge of the judge that "such note was a valid note," and that it "was not shown that any legal defense existed to the first note," was erroneous. The judge held and decided on the trial that if the first note had been invalid, the plaintiff would not have been entitled to recover.

VII. The second note was void. This was conceded by the judge, so far as the parties to it were concerned. We insist that it was void in the hands of the plaintiff, because,

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(1.) He was a director in the company at the time the note was given, and Davis was an agent or officer of the company, appointed by the directors, and acted as such in taking the note. (2.) The consideration of the note was the illegal issue by the company, of which the plaintiff was a director, of \$9000 of the preferred stock. Such issue being by the legally constituted officer of the company, is the act of the company, and the directors are chargeable with notice of such issue. (3.) The transaction in relation to the issuing of the \$9000 of preferred stock, for which this note was given, was entered on the books of the company, by the secretary Davis, and the books were open to the inspection of the directors. It was the duty of the directors to examine them, and the law charges them with notice of their contents. (4.) The fraud, in issuing the \$9000 of preferred stock, and taking the note, was the act of the agent of the directors of the company, of whom the plaintiff was one. The power of perpetrating the fraud, and the means of effectuating it, were placed in the hands of such agent by the directors, of whom the plaintiff was one, and under no circumstances can he be permitted to reap the benefits of the fraud. (5.) The plaintiff, in view of these facts, is chargeable with notice of the transaction out of which this note originated, and therefore, whether the first note was void or not, the second one cannot be enforced by the plaintiff.

VIII. The judge erred in refusing to charge the jury as requested by the defendants' counsel.

IX. The charge of the judge is erroneous, in the several portions thereof to which the exceptions are taken.

X. The plaintiff was, at least, so far apprised of the facts in relation to the second note, as to put him upon inquiry as to its legality. Because he knew, (1.) That the defendant Badger refused to pay the first note. (2.) That Badger was sued on that note, and defended that suit. (3.) That the note now in suit grew out of the settlement of the action on the first note, for he advised the settlement and the taking of

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a new note. These facts, about which there is no dispute, are sufficient to put him on inquiry as to *how* that action was settled, and how and on what consideration the present note was given. And he is, therefore, chargeable in law with knowledge of the true consideration of the note. In addition to all this, are the further facts before referred to, that Davis was the agent and secretary of the company, and the plaintiff was a director. That the first note was given to the company for preferred stock, with the knowledge and under the advice and direction of the plaintiff.

XI. This transaction throws a little light upon a great mystery that has hung over and dishonored the history of rail road corporations of this country, viz. that directors and officers of these companies invariably grow rich, while those who furnish the means to build the roads grow poor, and the stock disappears into the oblivion that reigns below the financial cipher. Magee, the director, is paid; Davis, the secretary, is paid; the stockholders are plundered of \$9000, and Potter plundered of the amount of the note on which his name appears as surety. This wrong ought not to be sanctioned by the courts.

*R. B. Van Valkenburgh*, for the plaintiff. I. The defendants' exception at folio 46, (in respect to the onus of showing that the plaintiff received the note in good faith, &c.) was not well taken. It is only in case the possession of a note is obtained by fraud, or it is fraudulently put into circulation, that the rule insisted on by the defendants applies. In this case the defendants put the note in circulation voluntarily and with full knowledge of all the facts which they set up as a defense.

II. But conceding the exception to be well taken, the defendants afterwards supplied the proof themselves; see evidence of Davis and Magee called out by the defendants. This was a waiver of the exception. (*Vallett v. Parker*, 6 Wend. 615, 621. *Jackson v. Tuttle*, 7 Cowen, 364, and note a.)

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III. It is a rule well settled that when the court is requested to charge a jury on several connected propositions, and an exception is taken to a refusal so to charge, it must fall, unless each proposition is sustained. It is but a single question. (*Haggart v. Moryan*, 1 *Selden*, 422. *Jones v. Osgood*, 2 *id.* 233. *Van Kirk v. Wilds*, 11 *Barb.* 520.) The defendants' 1st and 2d propositions are each of them erroneous. (See point 4.) The 4th and 5th and 6th propositions assumed facts, none of which were warranted by the evidence. The most the defendants could ask was that the court should submit the evidence as to the assumed facts to the jury. The court did charge the jury as asked in the 7th proposition, so far as it was legal to do so. The 8th proposition is unfounded, as a legal position, and particularly so after the road, &c. had passed to a receiver, and directors had ceased to meet. The whole of these connected propositions, taken together, amount to asking the court to charge that the note sued on was void; that the plaintiff knew it was void and he was not therefore a bona fide holder of it, nor entitled to recover; or in other words, ordering a verdict for the defendants.

IV. The court was correct in charging that the rail road company was authorized by law to take notes for preferred stock, payable in a year, or any longer time. The act of 1854 provides that the holders of the present stock of said company may subscribe for the new stock in the proportion of one share for every three of old held by them, they paying the par value of \$100 for such new stock, "in such manner as the board of directors of said company shall direct, at the time of subscribing," and the directors were bound to give old stockholders three months' time for one half, and six months' time for the other half of the new stock they should subscribe for. (*Sess. Laws of 1854*, ch. 146, p. 334, § 2.) Badger was owner of 87 shares of old stock, and subscribed for new stock to prefer a portion of his old stock. The 7th section of the act provides only for the sale of the preferred stock to others, not stockholders, after the 1st day of July. There is no limit in

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the act as to the time when old stockholders may subscribe for the preferred stock. It gives them the preference until the 1st of July, but does not prevent them from taking it after that time. This same question was decided by Judge Strong, in *Magee v. Brooks*, where a bond and mortgage were taken for preferred stock.

V. The court was correct in charging the jury that the evidence showed that the plaintiff received the note before its maturity and parted with value at the time sufficient to constitute him a bona fide holder for value. The evidence referred to is in fols. 47, 48, and there is no conflict or doubt about it. (*Bank of Salina v. Babcock*, 21 Wend. 499. *Bank of Sandusky v. Scoville*, 24 id. 115. *Mohawk Bank v. Corey*, 1 Hill, 513. *Boyd v. Cummings*, 17 N. Y. Rep. 101. *Story on Bills*, § 192, n. 3; § 193, n. 1.)

VI. The court was correct in charging that the illegality of the note in suit was the issuing of the \$9000 of preferred stock. If the plaintiff's 4th point is correct, then the court was right.

VII. The court charged the jury that the note was void as between the parties to it; that if the plaintiff had actual knowledge of the facts making it void when he took it, it was void in his hands; that if the plaintiff had knowledge of facts or circumstances to raise suspicion, &c., he could not recover, and submitted the proof upon those subjects to the jury in strong language, for the defendants. The defendants got, in these various charges, all and more than they were entitled to in instructions to the jury. The true rule now is, that to defeat the title of a holder of negotiable paper for value, he must be actually guilty of bad faith in acquiring such title. (*Hall v. Wilson*, 16 Barb. 548, 550.)

*By the Court*, JOHNSON, J. The objection of the defendants to the validity of the first note is two fold: 1. That the company had no power to take a note at all, upon a subscription for preferred stock; and, 2. That if they could take

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a note, they had no right to take one payable in one year from the time of such subscription. The act of April 1, 1854, (*Sess. Laws of 1854, ch. 146,*) authorizes the company to receive subscriptions for preferred stock, and to issue such stock to subscribers for the same. The subscribers were required to pay the par value of such shares as they were authorized to take, "in such manner as the board of directors of such company should direct, at the time of subscribing." The defendant Badger subscribed for the number of shares he was entitled to as a stockholder, and gave the note on such subscription, at the time. No note was necessary. The subscription was binding, and would have enabled the company to collect the amount subscribed, without any note. But the board of directors were to direct the manner in which the amount should be paid at the time of the subscription, and the promise was reduced to the form of a note. I see no error in this, or any want of power on the part of the company. They were authorized to take the subscriber's promise, and the form in which it was made cannot be material; nor do I see any difficulty in their giving the subscriber a year's credit, if they saw proper to do so, at the time the subscription was made. The act clearly contemplates giving credit to the subscribers. It did not require subscriptions to be paid in cash at the time they were made. There is nothing in the terms or spirit of the act which limited the board of directors to any specific number of days, or months, in the term of credit they might give. I think, therefore, the judge was clearly right in holding that the first note was a valid note, in the hands of the company, it having been given upon an authorized and valid subscription to the preferred stock. Being valid in the hands of the company, it was equally so in the hands of Davis, to whom it was regularly transferred, in part payment of a demand due him from the company. The defendants make no point, that the first note was not regularly transferred to Davis, so as to make him the lawful owner and holder. That note having been a valid note, it is

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difficult to see why the note in question, which was given in settlement of the action brought to recover the amount due upon it, is not also a valid note. It certainly had a good consideration, to the amount due upon that note. There was, as we have seen, no valid defense to that note. And even if there had been such defense, it was competent for the defendant to waive it, and settle the controversy by giving a new note, which would be valid, as given in settlement of a disputed claim, and for the purpose of avoiding litigation. A party giving a note under such circumstances, would not be permitted to set up as a defense to it the invalidity of the prior note, unless he could show that he was in some way deceived and defrauded in the settlement. This is alleged here. But from the evidence upon the trial it seems to me very doubtful, to say the least, whether Badger was deceived or defrauded in the least, by the issue to him, by Davis, as secretary of the company, of a greater amount of preferred stock than he was entitled to, or could claim upon his subscription. If he knew he had no right to it, and that Davis had no authority to issue it, and that it would be entirely worthless even if Davis had such power, how can he now claim that he has been deceived or defrauded in the transaction? But if defrauded, and he should seek to repudiate the note in question on that ground, he must restore the old note given up on the settlement, and place the other party in the same situation in which he stood at the time of the settlement. Many other considerations might be suggested, pertinent to the defense here insisted upon, but it is unnecessary to pursue the subject, as the judge charged the jury that this note was void in the hands of Davis, as against both maker and indorser. Of course the defendants cannot complain of this, and the plaintiff is not here with any exceptions. Assuming, therefore, for the purposes of this motion, that the note in question was voidable in the hands of Davis, on the ground of the fraud in the issue of the preferred stock, had the plaintiff a good title, and could the defendants interpose their defense,

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to the note in his hands? He was certainly a holder for a valuable consideration, and took the note before maturity. The judge so charged, and the exception to this part of the charge is not well taken. The question whether the plaintiff had notice of the facts constituting the defense at the time he took the note, was a question of fact, to be submitted to the jury as it was. And certainly the defendants have no reason to complain of the manner in which this question was submitted. The charge was far more favorable to them than they had a right to require. The judge not only charged, that if the plaintiff took the note with notice of the facts, it would be void in his hands; but he went farther and charged, in substance, that if he had knowledge of facts or circumstances which should have prompted further inquiry that might have led to a knowledge of the facts, the note would for that cause also be void. This latter branch of the charge went beyond the settled rule of law, in regard to the validity of negotiable paper in the hands of a holder for a valuable consideration. (*Hall v. Wilson*, 16 Barb. 548, and cases there cited.) None of the exceptions to the charge are well taken. There is but a single exception to the refusal to charge as requested; and in order to sustain that, the defendants' counsel must show that every proposition submitted is tenable. They were all, as appears by the case—nine in number—submitted at the same time, with a single request to charge in favor of all. The court refused, and the defendants' counsel excepted. If either proposition was erroneous the exception falls, although a portion of them were sound in point of law. (*Haggart v. Morgan*, 1 Seld. 422. *Jones v. Osgood*, 2 id. 233.) It has been shown above, that several of these propositions were unsound; and indeed I doubt whether either of them can be upheld, upon the facts appearing on the trial. A new trial must therefore be denied.

[MONROE GENERAL TERM, December 5, 1859. T. R. Strong, Welles and Johnson, Justices.]

BRABIN *vs.* HYDE.

Where one purchases goods of another, agreeing to apply the amount agreed on as the price, in payment of a precedent debt, by giving credit therefor, the transaction, so long as it rests in mere words, is void by the statute of frauds; but is valid the moment the act of giving the credit is performed by the buyer.

B. being indebted to H., it was agreed between the parties that H. should take certain property of B., which was pointed out and the price of which was agreed on, and credit B. the sum specified as the price, upon his books. This was done by H. as soon as he got home, where his books were kept, which was during the same day and within a very short time after the making of the agreement. *Held* that this was to be regarded as a payment made at the time of the agreement, within the meaning of the statute of frauds; and was a complete execution and performance of the contract, on the part of H., and a payment of B.'s debt, to the extent of the price agreed on.

The moment payment is made, in pursuance of such an agreement, the transaction is taken out of the statute of frauds, the party is bound by his bargain, and he cannot afterwards rescind it, or treat it as a nullity.

**T**HIS action was brought to recover the possession of a bay mare and colt, and damages for the detention thereof. The defendant, by his answer, admitted the detention of the property, and claimed the right to detain it, as the owner thereof. That he became such owner by virtue of a sale and delivery of the same, theretofore made by one Milton Blackmer to him; and that said Blackmer, at the time of such sale and delivery, was the true and lawful owner of the property, and that such use and detention was by virtue of the defendant's ownership; and that the plaintiff, by legal process, on or about the 4th day of September aforesaid, took said property from the possession of the defendant, and yet kept possession of the same. On the trial, the value of the property was proved to be \$175. The material facts, bearing upon the principal question examined by the court on this motion, were detailed by the defendant, who was examined as a witness. He testified that in July, 1857, he was, and for some time previous had been, a merchant, in Mumford; that at that time Blackmer owed him \$216 or \$226. "I went to Black-

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mer's place, and wanted him to pay me. He said it was just before harvest, and he could not. I told him I was going to the west, and wanted to fix it up before I went; wanted an indorsed note, or a chattel mortgage. He declined giving a chattel mortgage because it would have to go on file, and would hurt his credit. He said he would sell any thing on the farm; then talked about different property; spoke of the black colt; he did not want to sell it, but he would sell me the bay mare he got of Augustus Harmon, and the colt. He wanted \$200; I wanted to give \$150. We finally agreed upon \$175 for the mare and colt. He then wanted to know whether I would honor a few orders to his men, if he paid the balance promptly. I told him I would give him credit on my books, when I got home, for \$175. He said that would be right. I then told him my grass was not a good crop on the meadows, and asked him what he would take to let the mare and colt run in the lot till the 1st or 15th of September. I went down and examined the property, and then went home and made the entry in book, giving him credit for the \$175; made the entry on the same day of the purchase; it is the original entry. He wanted to know whether I was going to put it on the notes or book; I told him it would be on the book; told him if he wanted to settle he could strike out the balance on the books and put the balance on the notes I held against him. He said that would be right. He pointed out the mare and colt in the lot. I knew them before I went away, on the 8th or 10th of August."

It was proved that on or about the 18th of August, 1857, the defendant sent a couple of men who took away the mare and colt, while the same were in the possession of the plaintiff. The defendant afterwards admitted that he had taken away the animals, and claimed that they belonged to him. The plaintiff claimed the property by virtue of a purchase thereof from Blackmer, made in August, 1857. The jury rendered a verdict in favor of the plaintiff, and assessed the value of the property at \$175; and from the judgment entered thereon the defendant appealed.

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*D. C. Hyde*, for the appellant.

*A. J. Wilkin*, for the plaintiff.

*By the Court*, JOHNSON, J. The principal question in this case arises upon the charge of the judge to the jury, that the contract for the sale of the animals in question, between the defendant and Blackmer, was void by the statute of frauds.

Assuming, as we must, for the purpose of examining this question, that the version of the transaction given by the defendant in his testimony is the true one, I think the learned judge was mistaken in his view of the law applicable to the case. According to this statement, the price was agreed upon and the property pointed out. Blackmer (the owner) was indebted to the defendant, and it was agreed between them that the defendant should take the animals and credit Blackmer the price agreed upon, upon his books, which the defendant did as soon as he got home, where his books were kept. His residence was about one mile from Blackmer's, and the credit was entered the same day, and within a very short time after the agreement. This was clearly, I think, a payment of Blackmer's debt, to the extent of the price agreed upon and credited. It was a complete execution and performance of the contract on the part of the defendant. The contract was by parol, and was not binding until the price agreed upon was paid. The statute declares such a contract void, unless the buyer shall accept and receive the goods, or some part thereof, or shall at the time pay some part of the purchase money. Here the agreement and credit were obviously all one transaction. *The time* was continued until the credit was given, as the parties evidently contemplated that the defendant was to go to where his books were kept, before entering the credit. It must therefore be regarded as a payment made at the time, within the meaning of the statute. But, were it otherwise in this respect, the moment payment is made, in pursuance of the agreement, the transaction is taken out of the statute, even if it was within

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it before. It may be true that as long as the agreement rested in mere words, Blackmer might have put an end to it by rescission, or giving the defendant notice that he would not be bound or perform on his part. But having waited until the act of giving the credit agreed upon was performed, he was bound by the bargain, and could not thereafter treat it as a nullity. The cases of *Artcher v. Zeh*, (5 Hill, 200;) *Clark v. Tucker*, (2 Sandf. S. C. Rep. 157;) *Ely v. Ormsby*, (12 Barb. 570;) and *Walker v. Hussey*, (16 Mees. & Wels. 301,) hold that where goods are purchased, to be applied in payment of a precedent debt, by indorsement or credit, the payment is not made, within the contemplation of the statute of frauds, until the indorsement is actually made, or the credit given, or the goods are receipted in payment. But these cases all concede that when the agreement is consummated by the act of indorsement, or entry of the credit, according to the agreement, the transaction is no longer within the statute. As long as such a transaction rests in mere words, it is void, but is valid the moment the act of giving the credit is performed by the buyer.

The judgment must therefore be reversed, and a new trial ordered, with costs to abide the event.

[MONROE GENERAL TERM, December 5, 1859. T. R. Strong, Welles and Johnson, Justices.]

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### THOMAS vs. KELSEY and others.

On the 16th of February, 1857, C. made and delivered to King a bond and mortgage to secure him for all sums of money he might become liable to pay by reason of indorsements he might make for C., to an amount not exceeding \$10,000. The mortgage was not recorded until Sept. 2, 1857. On the 25th of July, 1857, C. made his note for \$2000, payable two months from date, to the order of, and indorsed by Kelsey, which was afterwards indorsed by King, for the accommodation of C. On the 22d of August, 1857, C. made another note for \$2000, at sixty days, payable to the order

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of S., which was indorsed by Kelsey, and afterwards by King, for the accommodation of C. Judgment was recovered upon both these notes, and collected of King. On the 10th of August, 1857, King made his own note, for \$2000, procured it to be discounted, and loaned the money to C., and on the 10th of August C. gave his note, indorsed by Kelsey, to King, for this \$2000, payable in two months. On this note Kelsey was not charged as indorser. On the 24th of September, 1857, a judgment by confession, in favor of King, against C., for \$6000, to secure the payment of the said three notes of July 25th, and August 10th and 22d, was docketed and filed. An execution was issued upon this judgment, on which \$2847.52 was collected, which was paid over to King, on account of the \$2000 which he had raised by the discounting of his own note, and loaned to C. on the 10th of August, 1857. This money was so applied in pursuance of parol directions given to the attorney, by C., at the time of issuing the execution.

*Held*, 1. That the directions given by C. in respect to the application of the moneys collected upon the execution, were in strict accordance with the rules, both of law and equity. And that, independent of any direction or agreement, the law would apply that money first to the payment and satisfaction of C.'s debt to King, for the money loaned; that being a fixed liability, at the date of the judgment, while the liability created by the indorsements was only contingent; and the latter claims being secured by the mortgage, while the former was not.

2. That the referee erred, in first applying the \$2847.52, collected on the execution, to the satisfaction of King's liability on the indorsed notes. That he should have first satisfied the debt for money loaned to C. on the 10th of August, 1857, and applied the balance to the liability of King on the indorsements.

3. That the mortgage in question had priority, as a lien and claim, over the judgments entered by confession, in favor of King.

A mortgage, being a valid instrument, as between the mortgagor and mortgagee, a subsequent judgment creditor has nothing to say, in respect to its being recorded or otherwise. The recording act relates to subsequent purchasers in good faith and for a valuable consideration, and not to judgment creditors.

A subsequent judgment will not be preferred over a prior unregistered mortgage given to secure future advances or liabilities; unless there has been a fraudulent intent, on the part of the mortgagee, in withholding his mortgage from the record.

The mere fact of retaining a mortgage six or seven months, without having it recorded, will not operate as a fraud upon subsequent creditors of the mortgagee, by the mortgagor, so as to postpone the mortgage to their judgments.

**T**HIS was an appeal, by both parties, from a judgment entered upon the report of a referee. The following facts were found by the referee: That Eli Chamberlain, on the 16th

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of February, 1857, made and delivered to Nelson King a bond and mortgage upon lands in Monroe county, conditioned "*to pay all sums of money that King might become liable to pay, by reason of any indorsements he might make at any time afterwards, of the promissory notes of said Chamberlain, or any renewal or renewals thereof; such indorsements not to exceed in the aggregate the sum of \$10,000.*" This mortgage was assigned to the plaintiff, by King, on the 21st of January, 1858. That King, on the 25th of July, 1857, indorsed Chamberlain's notes, payable to the order of John I. Kelsey, and indorsed by him, for \$2000, at two months, upon which note judgment was obtained by the holder against the indorsers, and paid by King in April, 1858. That on the 18th of May, 1857, Cyrus W. Palmer made his note for \$2000, at two months, payable to the order of Chamberlain; which note was indorsed by Chamberlain and by John I. Kelsey, at the request and for the accommodation of Chamberlain. That on the 12th of August, 1857, the Manufacturers' Bank recovered a judgment against the maker and indorsers for \$2036.72, damages and costs. This judgment was paid by Kelsey, except \$10 thereof, to the Manufacturers' Bank, and on the 9th of November, 1857, the bank assigned the judgment to Kelsey. On the 23d of the same month, Kelsey was, by order of the supreme court, subrogated to all the rights of the plaintiff in the action. On the 23d of March, 1858, he assigned the judgment to Griffin & Smith, who engaged to apply what was collected thereon in a particular manner. On the 22d of August, 1857, Chamberlain made his note for \$2000, at two months, payable to Kelsey's order. King indorsed this note after Kelsey. Judgment was recovered against the indorsers, on this note, and was paid by King in April, 1858. On the 2d of September, 1857, King recorded his mortgage in the clerk's office of Monroe county. Kelsey had no notice of the existence of the mortgage, until after the recovery of the judgment in favor of the Manufacturers' Bank against him and others, on the note of the 18th of May, 1857.

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On the 10th of August, 1857, King made his note for \$2000, due in two months, at the Rochester City Bank, and loaned the proceeds to Chamberlain. On the 24th of September, 1857, Chamberlain confessed a judgment to King, which was docketed and filed in the clerk's office of Monroe county the same day. This judgment was given to secure King the three notes above mentioned, of July 25th, and 10th and 22d of August. Chamberlain directed, by parol, the attorney to issue an execution thereon, and out of the money collected thereon to first pay the \$2000 which King had let him have; which directions were communicated to King. Execution was issued on that judgment, and the sum of \$2847.52 was collected thereon, and the amount was paid to King on the 1st of December, 1857. The referee also found that King kept the mortgage unrecorded, without any fraudulent intent; to which finding of fact the defendants excepted. The plaintiff did not except to any finding of fact, but did except to the decision of the referee, excluding parol evidence tending to show the parol directions given by Chamberlain as to the application of the money to be collected on the execution to be issued on said last judgment. The referee decided that the money collected upon the execution in King's favor, \$2847.52, should be applied upon the notes in the order in which they became due; to which decision the plaintiff excepted. The referee held that the mortgage, although not recorded until the 2d of September, 1857, was a lien for the notes indorsed by King, of the 25th of July, and the 22d of August, prior to the judgment in favor of the Manufacturers' Bank, of the 12th of August, 1857; to which decision the defendants excepted.

*W. F. Cogswell*, for the plaintiff.

*Griffin & Smith*, for the defendant Kelsey.

*Bartow & Olmsted*, for the defendant Lampson.

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*By the Court*, JOHNSON, J. I think the referee erred in the application of the money collected by the execution issued upon the judgment confessed. It was not a judgment collectable by installments, like that in the case of *Mains v. Haight*, (14 Barb. 76,) but was all collectible immediately; and independent of any other fact, the amount collected, whenever received, would apply equally in extinguishment of each and every part of the debt, fixed and established, absolutely, by the confession and the entry of judgment thereon. But as the judgment was obviously given by way of indemnity or security for several debts and liabilities, and the rights of other creditors have intervened, it becomes important to determine how the portion of the judgment collected should in equity and justice be applied.

It was given, as will be seen upon the face of the confession, for two notes upon which King was indorser for Chamberlain, and for a debt which Chamberlain owed King for money raised and paid to him upon King's note. This last mentioned transaction was, in substance and legal effect, money lent, from King to Chamberlain, and was an actual debt, due from the latter to the former, and not a mere liability, absolute or contingent. It was an absolute debt when the judgment was confessed. The others were, at that time, mere contingent liabilities, which might or might not become fixed. King's liability, however, as the referee has found, became fixed, when the notes fell due. But even then Chamberlain was not his debtor, independent of the judgment; nor did any right of action accrue to King by reason of his liability, against Chamberlain, until he paid the notes. This, as appears by the report of the referee, was not done until judgments were obtained upon the notes and executions issued. It appears by the evidence that an execution was satisfied by King on the 23d of January, 1858, and the other some time in May following. Judgment upon one of the notes was recovered against the maker and indorsers, including King, on the 1st of December, 1857, and upon the other

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on the 10th of March, 1858. It was admitted upon the trial that the money collected by virtue of the execution issued on the judgment confessed by Chamberlain to King, and which was issued on the same day the judgment was confessed and entered, September 25, 1857, amounting to \$2847.52, was received by the attorney from the sheriff of Erie county, to whom execution had been issued, and paid over to King on the 1st of December, 1857. This was the same day the first judgment was recovered against him, upon one of the indorsed notes, and over three months before the recovery against him upon the other note, and long before either judgment was paid and satisfied. When this amount, collected on King's execution against Chamberlain, was paid over, the note of the latter, taken as security for the money loaned, had become due, and this was the only debt, in fact, the latter then owed the former. The others rested in liability merely, and had those judgments been collected from either of the other parties, King could never have enforced the residue of his judgment against Chamberlain. The mere statement of the legal position of the parties, in respect to these claims, shows, I think, beyond any doubt, where the \$2847.52 should be first applied. The law, I think, independent of any direction or agreement, would apply it, first to the payment and satisfaction of Chamberlain's debt to King. It would not compel King to apply it in payment and satisfaction of a liability which was not yet a debt due from Chamberlain to him, and which might never, in point of fact, become one, leaving his own debt, which was otherwise wholly unsecured, altogether unpaid. (*Niagara Bank v. Roosevelt*, 9 Cowen, 409, 412. *Baker v. Stackpole*, *Id.* 420, 436.) If the law would not so apply it, equity manifestly would. As between them it was the first debt due. And if the lent note was to be considered a liability merely, it was a fixed liability at the date of the judgment, while the liability created by the indorsements was then only contingent. In every respect, therefore, it was the superior claim, as between the

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parties to the judgment. The other claims were secured by the mortgage. This was not, and I think that had King even paid the indorsed notes before this sum came to his hands, equity would apply it to the satisfaction of this unsecured debt. And, for the simple reason that the other demands were secured by the mortgage, and without such application, the creditor would suffer the loss of a part of his debt. It scarcely needs authority to support so plain and just a proposition. (*Bucks v. Albert*, 4 *J. J. Marsh.* 97. *Field v. Holland*, 6 *Cranoh*, 8. *Blanton v. Rice*, 5 *Monroe*, 253. *Bacon v. Brown*, 1 *Bibb*, 334. *Hart v. Dewey*, 2 *Paige*, 207.)

There are a class of cases where, as between debtor and creditor, several debts are owing, of different degrees, and payments have been made generally, without any direction on the part of the debtor at the time, or any specific application by the creditor, in which it has been held that the law would apply the payments thus made, to the satisfaction of those debts which would most benefit the debtor. This proceeds upon the presumed intention of the debtor to do what was most beneficial to himself, and to first discharge those debts for which he had procured a surety to become bound, or which he had secured by a pledge or mortgage, or the like. But those cases have no application here. There is nothing in this case to show that the debtor would be any more benefited by one application than the other. But beside this, such rule has never, I think, been applied when such an application of the payment would deprive the creditor of a portion of his debt. The law will never presume that the debtor intended thus to prejudice his creditor, but will rather presume that he intended so to apply his money and property as to discharge all his obligations.

The directions, therefore, which Chamberlain gave, when he confessed the judgment, were in strict accordance with the rules, both of law and equity, and the question whether they were admissible in evidence is wholly immaterial. The referee erred, therefore, in first applying this sum of \$2847.52 to the

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satisfaction of King's liability on the indorsed note. He should have first satisfied the debt for the note, or money loaned, and applied the balance to those liabilities.

In regard to the appeal taken by the defendants, I think the referee was clearly right in holding that the plaintiff's mortgage had priority, as a lien and claim, over the defendant's judgment. The mortgage being a valid instrument, as between the mortgagor and mortgagee, a subsequent judgment creditor has nothing to say in respect to its being recorded, or otherwise. The recording act relates to subsequent purchasers in good faith and for a valuable consideration, and not to judgment creditors. That a mortgage to secure future advances is valid, is well settled. (4 *Kent's Com.* 175. *Truscott v. King*, 2 *Seld.* 147.) If King, the mortgagee, had so dealt with his mortgage as to mislead and defraud the defendants or their assignors, equity would doubtless give a preference to their judgment over the mortgage. But the referee has found, from the evidence, that the mortgagee was guilty of no fraudulent intent in withholding his mortgage from the record as he did. I do not see, therefore, but the case falls within the general rule, which gives an unregistered mortgage preference over a subsequent docketed judgment. The judgment only operates as a lien upon the interest the judgment debtor has, at the time, in the premises. There is no case holding that a mortgage to secure future advances, or the liability to be incurred by future indorsements, must be recorded, to protect the mortgagee against subsequent judgments. And I do not see how such a judgment can be preferred, except upon the ground of fraud on the part of the mortgagee. (*Berry v. Mutual Ins. Co.*, 2 *John. Ch.* 603.) I am not prepared to hold that the mere fact of retaining a mortgage six or seven months, without having it recorded, operates as a fraud upon subsequent creditors of the mortgagee, by the mortgagor, so as to postpone the mortgage to their judgments. The rule laid down by Chancellor Kent, in his Commentaries, (*vol.* 4, *pp.* 175, 6,) does not sanction any such doctrine. What is there said in regard to

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notice of the agreement, relates obviously to what appears upon the face of the instrument as the agreement between the parties, and not to the recording of the instrument, under the recording act. The question under consideration is, whether such a mortgagee can claim, as against subsequent mortgagees and judgment creditors, for advances which the instrument upon its face and by its terms was not given to secure. In this respect, therefore, the decision of the referee was correct, and the judgment should be affirmed. But, for the error in regard to the application of the moneys collected upon the execution issued upon the judgment by confession, the judgment must be reversed, and a new trial granted, with costs to abide the event.

[MONROE GENERAL TERM, December 5, 1859. *T. R. Strong, Welles and Johnson*, Justices.]

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## WHITNEY vs. SLAUSON and others.

To sustain an action in the nature of an action of trover, for the wrongful withholding and detention of goods, after demand, the plaintiff must show, affirmatively, the facts requisite to constitute a conversion.

He must show a wrongful detention after the demand. A mere neglect, on the part of the defendant, to deliver upon demand, unless the goods are then in his possession, does not work a conversion of the property. The remedy, in such a case, is by another action.

The ability of the defendant, to comply with the demand when made, is an essential part of the proof on the part of the plaintiff, to sustain an action for a wrongful conversion.

Goods were purchased by C. of the defendants, and were by the latter boxed up for him, on the 4th of December, 1855. The defendants undertook to ship the goods to the plaintiff, but failed to do so, and there was no evidence to show what became of them after they were boxed up. Demand was made, of the goods, in October, 1856. *Held* that the law would not, under such circumstances, presume that the defendants had them in their possession at the time of the demand.

**A** PPEAL from a judgment entered upon the report of a referee. The action was brought for the wrongful with-

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holding and detention of a quantity of goods, groceries, &c. The referee found the following facts, viz: That on the 4th day of December, 1855, James D. Crank purchased of the defendants, at Rochester, the goods, wares and merchandise and groceries mentioned and described in the complaint, and directed them to be packed in a box and shipped by H. Shackleton's boat to Geneseo, the place of residence of said Crank; that the said goods were selected and packed in a box by the defendants, but were not shipped to the said Crank by said Shackleton's boat, and were never received by Crank; that the said goods, wares, merchandise and groceries became, and were, the property of said Crank. The referee further found that the defendants were possessed of the said goods, wares, merchandise and groceries, the property of the said James D. Crank; that the said Crank, on the 27th day of October, 1856, sold and assigned the said goods, wares, merchandise and groceries, to the plaintiff; that by such sale and assignment, the said goods and groceries became the property of the plaintiff; that the plaintiff, before the commencement of this action, demanded the same of the defendants; that the defendants neglected to deliver said goods, either to the said Crank or the plaintiff; that there was no evidence in the case to show what became of the goods and groceries, after the same were selected and boxed; that at the time they were selected and boxed, the box was placed and left in the store of the defendants. But it did not appear that said goods, &c. were not then in the possession of the defendants, and had not been for a long time previous to such assignment. The referee's conclusion of law from the foregoing facts was, that the defendants did not wrongfully withhold, keep or detain, or wrongfully convert to their own use, the said goods and groceries, and that the defendants were entitled to a judgment against the plaintiff for costs; to which decision or conclusion of law of the referee the plaintiff excepted. And from the judgment entered upon the referee's report, he appealed.

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*W. F. Cogswell*, for the appellant.

*Danforth & Terry*, for the respondents.

*By the Court*, JOHNSON, J. This action is not in the nature of a special action on the case, for the loss of the goods, through the carelessness or negligence of the defendants as bailees, but is in the nature of an action of trover for the wrongful withholding and detention of such goods, upon demand by the plaintiff. To sustain the latter action, it is necessary for the plaintiff to show affirmatively the facts requisite to constitute a conversion. He must show a wrongful detention after demand. A mere neglect, on the part of the defendant, to deliver upon demand, unless the goods are then in his possession, does not work a conversion of the property. The remedy in such case is by another action. (*Hawkins v. Hoffman*, 6 *Hill*, 586. *Hill v. Covell*, 1 *Comst.* 522. *Hall v. Robinson*, 2 *id.* 293. *Bowman v. Eaton*, 24 *Barb.* 528.) The ability of the defendant to comply with the demand when made, is an essential part of the proof, on the part of the plaintiff, to sustain the action for a wrongful conversion.

The referee has found that the goods belonged to the plaintiff's assignor, and that the defendants had them in possession, and did not ship them to the owner as they undertook to do. He also finds that there is no evidence before him to show what became of the goods after they were left in the defendants' possession.

It is contended, on behalf of the appellant, that from the facts found by the referee, the law will presume the goods to have been in the defendants' possession, at the time of the demand by him. The referee finds that the goods were purchased by Crank, the plaintiff's assignor, of the defendants, and were by the latter boxed for him, on the 4th of December, 1855. The goods were sold and assigned by Crank to the plaintiff, on the 27th of October, 1856. The demand by the plaintiff appears to have been made soon after, and about a

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year after the purchase by Crank, from the defendants. Under such circumstances, in the absence of all evidence as to what had become of the goods, the law, I think, will not presume that the defendants had them in possession, at the time they were demanded in behalf of the plaintiff; and the referee was right, therefore, in his conclusion of law, that the defendants did not wrongfully detain the goods.

The assignment to the plaintiff doubtless carried with it any existing right of action against the defendants for a prior conversion, or negligent loss of the property. (*McKee v. Judd*, 2 *Kernan*, 622. *Waldron v. Willard*, 17 *N. Y. Rep.* 466.)

The plaintiff, however, upon the trial, disclaimed any purchase of any prior right of action, and claimed only on the ground of a purchase of the title of the goods, from Crank. But upon the same rules above adverted to, no cause of action was proved in favor of the assignor.

The cause was therefore disposed of correctly by the referee, and a new trial must be denied.

Judgment accordingly.

[MONROE GENERAL TERM, December 5, 1859. *T. R. Strong, Smith and Johnson*, Justices.]

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## GANSEVOORT vs. KENNEDY &amp; MCCLAGAN.

Two partners cannot bind a third by an agreement for the dissolution of the partnership, and the repayment of the funds advanced by one of the two, to which agreement the third partner is not a party.

The fact that a promise to refund moneys advanced for the firm, is made by one of the partners to another after the latter has withdrawn from the firm, does not affect the principle.

Where a partnership is not to continue for any definite length of time, either of the partners has a right to withdraw, and thus dissolve the partnership, at any time he pleases. And whenever one does so, his rights become fixed by law.

He is liable to contribute his share, to all losses, and cannot take out the

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moneys he has put into the business until after the account of profits and losses has been adjusted and settled, and the debts of the copartnership have been provided for. This each partner has the right to insist upon; and an agreement of two of the partners, to the contrary, will not bind a third who is not a party to the agreement.

**A**PPEAL from an order made at a special term, granting a new trial. The action was brought by the plaintiff, as assignee of James R. Dales, to recover \$239.34, the amount put by Dales into the firm of Kennedy & Co. In January, 1855, the defendants, John Kennedy and Jessie McClagan, entered into a copartnership agreement with James R. Dales, for the purpose of erecting certain machinery for milling purposes and making staves, and for the purpose of carrying on the business of grinding grain and making staves. In the latter part of April, 1855, Dales left the partnership, and, at the time of leaving, the plaintiff claims that John Kennedy, one of the defendants, told Dales that he, Kennedy, was willing to pay Dales for all he had in the mill. William McClagan worked for the firm at the mill, and was the general agent of the firm in transacting its business about the mill, kept the books, and it was agreed between Kennedy, Dales and William McClagan, that Dales and William McClagan should get together and settle the partnership dealings with Dales; that McClagan called on Dales several times to settle, but no further settlement or agreement with Dales was ever had. The plaintiff proved his claim for work done and money put into the firm, and board furnished the workmen upon the mill, and showed the assignment of it to him. Upon the foregoing facts, the defendants moved for a nonsuit, on the following grounds: 1. That there was no evidence to charge the defendant Jessie McClagan upon the contract alleged in the complaint. 2. That the defendant John Kennedy could not bind the defendant Jessie McClagan, without her express authority, by an agreement such as is alleged in the complaint, or by such an agreement as the evidence tended to show. 3. Admitting that the defendant Kennedy had power

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to bind his co-defendant by the agreement alleged, there was not sufficient evidence to prove any definite arrangement of the partnership accounts of the defendants with Dales, nor any agreement made, such as an action at law could be maintained upon. Upon these points the court charged the jury, in substance, as follows: That although the evidence did not show any agreement on the part of the defendant Jessie McClagan to pay Dales what he had in the mill, yet if the jury found from the evidence an agreement on the part of Kennedy, after Dales had ceased to be a member, to pay him what he had put into the partnership, the plaintiff would be entitled to recover on the account against the defendants jointly; to which ruling the defendants excepted.

The jury found a verdict in favor of the plaintiff for the amount claimed by him. A motion for a new trial was subsequently made, by the defendants, at a special term, and the same was granted.

*Wisner & Seymour*, for the appellant.

*A. M. Bingham*, for the defendants.

*By the Court*, JOHNSON, J. The learned judge was clearly in error, in his charge to the jury, and also in his ruling on the motion for a nonsuit. The proposition in both cases is, that if the defendant Kennedy promised Dales, the retiring partner, after he had left the copartnership, to pay him what he had put in, it was binding upon both defendants, although one of them had no knowledge of any such promise, and never, in any manner, assented to it. This cannot be maintained upon any principle known to the law of partnerships. Dales was an equal partner, and of course was to share in all losses, as well as profits. As the partnership was not to continue for any definite length of time, he had the right to withdraw, and thus dissolve the partnership, at any time he chose. At the time of such withdrawal and dissolution, his rights would

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be fixed by law. He would be liable to contribute his share to all losses, and could not take out what he had contributed to the partnership funds, until after the account of profits and losses had been adjusted and settled, and all the debts of the copartnership had been fully paid and satisfied, or provided for, by agreement between all the partners. This each partner would have the right to insist upon, and the agreement of two of the partners to the contrary could not possibly bind a third, who was not a party to the agreement. The agreement might, perhaps, be binding upon the parties to it, but the partner not consulted, and who did not become a party to the arrangement, might still insist upon his legal rights, under the partnership agreement. It is quite clear that the agreement of two partners cannot affect the rights of a third, in respect to the partnership agreement, without the assent of the latter. There is nothing to show what the state of the partnership accounts was, at the time of the withdrawal of Dales. It does not appear whether the concern had sustained losses, or accumulated profits, nor whether the property on hand, at a fair valuation, was worth what it had cost. The case seems to have turned wholly upon the right of two partners to bind a third by an agreement for the dissolution of the partnership, and repayment of the funds advanced by one, to which such third partner was not a party. The fact that the promise was made after Dales had withdrawn could not, obviously, affect the principle. Kennedy could not then affect the fixed legal rights existing between Dales and Mrs. McClagan, any more than he could before. He could not deprive her of a right to a settlement of the affairs of the partnership, by his agreement. The promise was in no respect binding upon her, unless made with her knowledge and assent; and the recovery against both defendants is therefore erroneous.

The order granting a new trial should therefore be affirmed.

[MONROE GENERAL TERM, December 5, 1859. *T. R. Strong, Smith and Johnson*, Justices.]

DECK *vs.* RANSOM E. JOHNSON.

Where, on the trial of an action, a person offered as a witness for the defendant, was objected to and rejected, on the ground that the defendant had signed the notes on which the action was brought, as surety for the witness' wife, who was not joined in the suit; *Held* that the witness offered was a competent witness for the defendant, notwithstanding his relation to the principal debtor; though he would not have been competent had she been a party.

**M**OTION for a new trial, on a case and exceptions ordered to be heard in the first instance at a general term. The action was brought on five promissory notes, for \$100 each, payable to the plaintiff, and signed by Lauraette Johnson and Ransom E. Johnson, the defendant. Lauraette Johnson is a married woman, the wife of Nelson Johnson. She owns a large separate estate, consisting of mills, stores and farms. Her husband is insolvent, and has been for many years, and manages his wife's estate as her agent. The notes in suit were signed by the defendant as surety for Lauraette Johnson, for whose benefit the plaintiff loaned the money for the payment of which the notes were given, on the application of her husband, acting for her. On the trial, the defendant offered Nelson Johnson, the husband of Lauraette Johnson, as a witness. The plaintiff's counsel objected to his competency as a witness, on the grounds: 1. That he was the husband of Lauraette Johnson, who was co-maker, with the defendant, of the notes in suit. 2. That the said Lauraette Johnson had a separate estate, and that her husband Nelson Johnson acted as her agent. That the money loaned went to the benefit of the wife and her estate. 3. That the wife of the witness was in equity, and as between the defendant and herself, the principal in the notes and answerable over to the defendant, if a recovery should be had against him, and her separate estate would be chargeable therefor; and that the witness was therefore in fact offered, and his testimony, if allowed and was material, would in fact be in behalf of his wife, and he was therefore incompetent. The issue as to his competency was

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tried by the court, and the witness was finally rejected for the following reasons:

"1. The evidence satisfies me that this money was obtained for the benefit of the wife of Nelson Johnson. If we are to take the evidence of Nelson Johnson alone, the money was mainly used to stock her mill in Pennsylvania. He was insolvent, and she had a separate estate. The plaintiff had previously lent money on the wife's notes. He had the right therefore to suppose that this was a loan of a similar character.

2. However this may be, she is to be deemed as intending to charge her separate estate by putting her name to the notes. If she is to be intended as having knowledge of the law, no other motive can be ascribed to her, in the absence of any evidence on the subject. The simple fact that she signed the notes is evidence of such intention: if not, she is to be regarded as doing an idle act, without an object.

3. The defendant swears he signed the notes as surety. Surety for whom? Surety for the wife, of course. Nothing was said to him about the timber contract until two weeks afterwards. Mrs. Johnson's separate property is therefore liable to be charged for the payment of this whole debt.

4. But can the record in this case be evidence in an action to charge the wife's separate estate. It clearly could not, to prove the existence of the indebtedness, provided the plaintiff succeeds in the present action. But if he should not succeed here, (and he can only fail upon the ground set up in the answer,) I incline to think it would be admissible to sustain a defense of usury to be set up by her."

To this decision the defendant excepted. The cause was then submitted, and under the direction of the court the jury found a verdict for the plaintiff for \$500, and interest thereon from January 6, 1857.

*Hammond & Ferris*, for the plaintiff. I. The court ruled correctly in admitting the plaintiff to testify. Notice was not necessary, of the point to which he was called. This was an

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issue addressed to the court. It was not an issue in the action. Its object was only to inform the mind of the court as to the actual position of the witness Johnson, touching his competency.

II. The question as to the statement of Nelson Johnson, at the time of borrowing the money for which the notes were given, as to the uses for which it was wanted, was *res gestæ*—a part of the transaction of the loan itself. Johnson was the agent of Lauraette Johnson, and acted as such in borrowing the money and delivering the note. His statements, therefore, *made at the time of the loan*, were competent evidence, especially on this collateral issue before the judge.

III. The facts as found by the judge on the issue thus tried before him, are abundantly sustained by the proof, and will not be disturbed.

IV. The fact being established that Lauraette Johnson was the principal, and Ransom E. the surety, in the loan for which these notes were given, her separate estate would be liable for the debt in case Ransom E. had it to pay. In that case the record would be evidence of the recovery and amount in an action by Ransom E. to charge her separate estate.

V. In an action by the present plaintiff against her to charge her real estate, the record in this action would be conclusive against the plaintiff, should Ransom E. Johnson, the defendant in this action, succeed in defending it on the ground of usury.

VI. The question then is, can a husband be called as a witness for the defendant, and to defeat a recovery in an action in which his wife, though not named in the pleadings, is the real defendant, and will be compelled to pay the amount recovered, if a recovery is had, and who will be released from a demand chargeable upon her separate estate in case a recovery is defeated? This, we think, involves the other question: Can a husband be a witness for or against his wife in any action which involves her character, her property, or her liberty? We insist that he cannot. (2 *Kent's Com.* 178, and the authorities there cited.)

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*A. S. Kendal*, for the defendant. I. The court erred in excluding Nelson Johnson as a witness for the defendant. If, for the purpose of examining the question, it be conceded that the court correctly found that the money for which this action is brought was obtained for the wife of Nelson Johnson, and that the defendant, R. E. Johnson, signed the notes as her surety, and that the wife intended to charge her separate estate by signing the notes, even then, Nelson Johnson was a competent witness for the defendant. A witness never was excluded by reason of his interest, but upon the following grounds: 1st. That he was directly interested in the event of the particular action; or, 2d. That in a subsequent suit, the record of the former might be used for or against him. (1 *Phillips' Ev.* 84, 3d ed.) 1st. The court excluded Nelson Johnson as a witness, on the ground that the record in this action might be used by the wife of Nelson Johnson in a subsequent suit against her estate by the now plaintiff, to sustain a defense of usury to be set up by her. In this the learned justice erred, for the following reasons: (1.) The relation which subsists between principal and surety, or principal and guarantor, does not render either of them privy to a suit brought against the other. (2 *Smith's Lead. Cases*, 684-6, 5th ed. 2 *Am. Lead. Cases*, 341, 3d ed.; 440-2, 445, 4th ed. *Douglass v. Howland*, 24 *Wend.* 35. *Jackson v. Griswold*, 4 *Hill*, 522. *Morris v. Lucas*, 8 *Blackf.* 9. *Barker v. Cassidy*, 16 *Barb.* 177. *Parkhurst v. Summer*, 23 *Verm. Rep.* 338. *Masser v. Strickland*, 17 *Serg. & Rawle*, 354, 358. *Patten v. Caudwell*, 1 *Dall.* 419. *Kip v. Brigham*, 6 *John.* 158. *Moss v. McCullough*, 5 *Hill*, 134-6.) The principal will not be bound as a privy by the result of a suit brought for the debt against the guarantor or surety, (2 *Smith's Lead. Cases*, 684, 5th ed. 16 *Barb.* 177, and the cases above cited. 1 *Kelly*, 410.) (2.) All estoppels are mutual. A record that cannot be used against a party, cannot be used for him. (*Lansing v. Montgomery*, 2 *John.* 382. *Ruggles v. Sherman*, 14 *id.* 446.

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*Dale v. Roosevelt*, 1 *Paige*, 35. 16 *Barb.* 182. (3.) A party cannot use a record in his own favor, founded in whole or in part upon his own evidence. (*Brown v. Brown*, 2 *E. D. Smith*, 155. *Maybee v. Avery*, 18 *John.* 352. 2 *Cowen & Hill's Notes*, 541, 2, 167, 3d ed.) (4.) Where an action is brought against the separate estate of a married woman, for money loaned for the benefit of such estate, she cannot set up the defense of usury. (2 *R. S.* 182, § 5, 4th ed. *Rice v. Welling*, 5 *Wend.* 595. *Early v. Mahon*, 19 *John.* 150.) (5.) The wife could not charge her estate by signing the notes. (*Yale v. Dederer*, 18 *N. Y. Rep.* 265, reversing same case, 21 *Barb.* 286. 14 *How. Pr. Rep.* 391; 16 *id.* 93. 27 *Barb.* 480. 2 *Sand. Ch.* 288.) 2d. Nelson Johnson could not have been properly excluded, on the ground that his wife was interested in the event of this action, and was not. Had he been excluded upon this ground, it could have been obviated upon the trial by release. (1.) Where the interest of the wife is balanced, the husband is competent. (*Marshall v. Davis*, 1 *Wend.* 109. *Cowen & Hill's Notes*, 88, 3d ed.) (2.) The wife of Nelson Johnson had no preponderance of interest to favor the defendant, as in any event of this suit she could not be liable to the defendant. The ground upon which the principal is liable to the surety, is an implied promise by the former that he will pay the surety, whatever he may be compelled to pay the creditor. (*Chitty on Contracts*, 517, 8th ed. *Powell v. Smith*, 8 *John.* 249. *Tom v. Goodrich*, 2 *id.* 213.) (3.) Any costs necessarily incurred by the surety, and which he may be entitled to recover from the principal, can only be recovered under a special count, founded upon the implied promise of indemnity. (*Bonney v. Seely*, 2 *Wend.* 481. *Chitty on Contracts*, 518, 8th ed.) (4.) Lauraette Johnson, being a married woman, would not be liable over to her surety, clearly not for his costs. 3d. The wife of Nelson Johnson had no interest in the event of this action. Her separate estate was not liable to be charged with the payment of this debt. (1.) Mrs. Johnson did not charge

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her estate by signing the notes. (*Yale v. Dederer*, 18 N. Y. Rep. 265; 17 How. Pr. Rep. 165, S. C.) (2.) There is an absence of evidence to show that this money went for the benefit of her estate. The evidence of Solomon Deck is all there is on the subject, and that should be excluded. (3.) Were it otherwise, the declarations of Nelson Johnson are clearly insufficient to establish such fact. (4.) Such fact is not established by the evidence of Nelson Johnson, nor by the evidence of R. E. Johnson. Nelson Johnson testifies that the money was not got for the benefit of his wife; that the money was got to purchase a timber lot; that he used this money in purchasing the timber lot in his own name, and in taking out a patent. Ransom E. Johnson testifies that when he signed the notes, Nelson Johnson told him he wanted the money to buy timber; that he signed the notes for that purpose; that Nelson Johnson told him of the timber contract, and he signed the notes for his accommodation; that he had no conversation with Lauraette Johnson on the subject of these notes. Solomon Deck testifies that he never asked for security for money that Lauraette Johnson wanted; that he never had any conversation with Mrs. Johnson as to what use was to be made of this money. Nelson Johnson made the arrangement with the plaintiff before the notes were taken. When Nelson Johnson came for the money, he had the notes with the defendant's name on them, which was not required when Lauraette Johnson wanted money. The learned justice erred in finding that the money was mainly used to stock the wife's mill in Pennsylvania. The only evidence upon that point is, that some of the timber had been taken to the wife's mill. (5.) There is an absence of evidence that the defendant was the wife's surety. The evidence is direct, that he was the surety of Nelson Johnson. (14 How. Pr. Rep. 391. 16 *id.* 93. 27 Barb. 480.) The money belonged to Nelson Johnson.

II. The court erred in allowing Solomon Deck, the plaintiff, to be examined as a witness in his own behalf, no notice

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having been served of his intended examination. (*Oode*, § 399.)

III. The plaintiff should not have been permitted to testify to the declarations of Nelson Johnson, as to the use of this money.

JOHNSON, J. On the trial of this cause, Nelson Johnson was offered as a witness for the defendant, and was rejected, on the ground that the defendant had signed the notes, on which the action was brought, as surety for the wife of the witness offered. The decision was put upon the ground that should the defendant succeed, the record of the judgment would be evidence to sustain the same defense, in favor of the wife, in an action against her, by the plaintiff, to charge her separate estate. Since the decision of the court of appeals in the case of *Yale v. Dederer*, (18 *N. Y. Rep.* 265,) it may be doubted whether there was sufficient evidence before the court to charge her separate estate. If not, the defendant was not, in any legal sense, her surety: because, if her separate estate was not charged, the note, as such, was not obligatory in any respect upon her.

But conceding that her separate estate was charged by the transaction, and that the defendant is to be regarded as her surety, either in law or equity, in respect of these notes, still the decision was, I think, clearly erroneous. The ground upon which persons at common law are bound by a former judgment, or decree, upon the same subject matter is, that they were either parties to the former action, or stood in legal privity to it, so as to be concluded by it. It is not binding between persons who were neither parties nor privies. It seems to be well settled that in a separate action, brought by the creditor, against either principal or surety, the party not joined is not concluded or affected by the judgment. (*Douglas v. Howland*, 24 *Wend.* 35. *Jackson v. Griswold*, 4 *Hill*, 522. *Moss v. McCulloch*, 5 *id.* 134. *Barker v. Cassidy*, 16 *Burb.* 177.)

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And in *Jackson v. Griswold* it was held that a surety was not bound by a judgment against his principal, at the suit of the creditor, even where the defense was conducted exclusively by the surety, as agent for his principal, he not being a party to the record.

And in the same case, Cowen, justice, referring to a separate action by the creditor, against the principal debtor, says that "a mere surety for the payment of a debt, without any agreement, express or implied, to be bound by a suit between the principal parties, is, at common law, no more affected by the event, if against him, than a mere stranger." In such a case, however, the learned justice concedes that had the judgment been against the plaintiff, the surety would have been discharged. This, however, is not on the ground of his being a party, or privy, but because the judgment would extinguish the debt; and the principal thing being destroyed, the obligation of the surety, being the incident, is necessarily destroyed with it. But for the same reason a judgment in favor of a surety, against the creditor, in a separate action by the latter, against the former, would not affect the rights of the creditor against the principal debtor; because such a judgment would not necessarily extinguish the debt, and such principal debtor would be neither party nor privy to the action. It can scarcely be pretended that Mrs. Johnson is concluded by the result of this action against her surety, as there is no pretense of any agreement on her part, to be bound by any such litigation.

Estoppels, of this description, are mutual; and as she is not bound, neither would the creditors be, as against her, had the result been the other way.

The rule of the civil law is different, and for a good reason, for there the surety in such a case is regarded as the same party with the principal, with respect to whatever is decided for or against him, and has the right to appeal from the judgment, although not a party to the record. The witness offered was, therefore, a competent witness for the defendant,

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notwithstanding his relation to the principal debtor; although he would not have been, had she been a party to the action.

It follows that a new trial must be granted, with costs to abide the event.

T. R. STRONG, J. It was found at special term, that the money in question was lent by the plaintiff upon the credit of Mrs. Johnson, and her request generally to the plaintiff to let her husband have the money upon her notes; and that it was to be inferred from her giving the notes, and the request made by her, that she intended to charge her separate estate with the payment of the indebtedness; but it was further found, that the money was not borrowed by her for the benefit of her separate estate; and it is equally clear upon the evidence, that it was not borrowed or used for her benefit, in any respect. I think the evidence establishes that she gave the notes, and requested the plaintiff to let her husband have the money on them, for the accommodation and as the mere surety of her husband. In this view of the facts, the principle of the case of *Yale v. Dederer*, (18 N. Y. Rep. 265,) is decisive against the action. It is held in that case, "that a wife's separate estate is liable to pay her debts during coverture, in whatever form they are incurred, not because her contracts have any validity at law, nor by way of appointment or charge, but because equity deems it to be just that they should be paid out of such estate;" and further, that "if the promise is on her own account, if she or her separate estate receive a benefit, equity will lay hold of those circumstances and compel her property to respond to the engagement. Where these grounds of liability do not exist, there is no principle on which her estate can be made answerable."

The judgment should therefore be reversed, and a new trial granted, with costs to abide the event.

WELLES, J., concurred.

New trial granted.

[MONROE GENERAL TERM, December 5, 1859. T. R. Strong, Welles and Johnson, Justices.]

SPALDING *vs.* HALLENBECK and SPENCER.

Where the owners of a farm conveyed the same in fee, on condition that the grantee should support and maintain them during their respective lives; *Held* that this was equivalent to receiving a life annuity as the purchase price, which was a valuable consideration.

*Held also*, that there was a binding agreement, on the part of the grantee—manifested by his accepting the deed and entering into possession under it—to maintain the grantors, which was a sufficient consideration to support the deed.

**M**OTION for a new trial, on a case and exceptions. The action was brought to recover the possession of a farm in the town of Fulton, Schoharie county, and was tried at the Schoharie circuit, in May, 1858. On the 22d of March, 1856, the plaintiff and his wife, being the owners in fee of the premises in question, duly executed a warranty deed thereof to the defendant Hallenbeck, which deed recited that it was “in consideration of the covenants and conditions hereinafter contained.” The conditions specified in the deed were as follows: “This conveyance is made upon the express condition, and the consideration of the above conveyance is, that the above named David Hallenbeck is to and agrees to keep, maintain and support the said Ezra Spalding, the party of the first part, and the said Jenny his wife, during their natural lives, both in meat, drink, clothing, nursing, care and attention, both in sickness and in health, doctoring suitable and convenient for people of their age, and at all times to use them, the said Ezra Spalding and Jenny his wife, kindly and proper, for people of their age. And if the said David Hallenbeck shall, at any time after the ensealing and delivering of this conveyance, fail to perform and keep the said Ezra Spalding and Jenny his wife according to the manner and condition above expressed, then this conveyance to be void, and the land herein conveyed revert back to the said Spalding and wife, the parties of the first part, they the said Spalding and wife binding themselves to pay the said David Hallenbeck, the party of the second part, for what time he shall then have so kept them, the said

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Ezra Spalding and wife, according to the above agreement, above what the use and occupation of the said place has or shall then have been worth, if any more shall be due to said Hallenbeck."

This deed was duly acknowledged and delivered, and recorded in the office of the clerk of Schoharie county. The grantee, at the time of the execution and delivery of the deed, and in consideration thereof, agreed verbally, to support the grantors, in the manner specified in the deed. He entered into possession under the deed, immediately, and cultivated and occupied the farm, and still continued in the possession. He maintained and supported the grantors, according to the condition, until the 9th of June, 1856, when the plaintiff's wife died. The plaintiff continued to reside with him until the 22d of August, in the same year, when he left, voluntarily, and without the fault of the defendant. The defendant offered to perform his agreement. The judge decided that the plaintiff was entitled to recover the premises in question; to which decision the defendants' counsel excepted. The counsel for the defendants then, to show that the plaintiff was not entitled to recover \$50 per annum for the use and occupation, offered to prove the value of the keeping of the plaintiff and his wife, and their support and maintenance; to which the counsel for the plaintiff objected, on the grounds, 1st. That the evidence offered was irrelevant, and did not tend to prove title in the defendant under the deed from the plaintiff; and 2d. That no notice of such defense was set forth in the defendants' answer, and offered to accept a verdict for use and occupation from the time the plaintiff left the house of the defendant Hallenbeck. The court sustained the objection, and overruled the evidence; to which the counsel for the defendants excepted. The judge thereupon ordered a verdict for the plaintiff for the premises in question, and the sum of \$87.50 for the use and occupation thereof from and after the time the defendant Hallenbeck ceased to support the plaintiff, and the jury rendered a verdict accordingly.

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*A. Becker*, for the defendants. I. This deed, even if it had been executed before the revised statutes, under the circumstances, would have been valid. (*Jackson v. Florence*, 16 *John*. 47.) The court, Spencer, J. says: "Taking the whole deed together, the inference is irresistible that the defendant never bound himself by any *covenant or agreement* which could be enforced to support the lessor." That Hallenbeck could have been made liable for a breach of *the contract* he himself swears he made, argument and authority are unnecessary to prove. (*Jackson v. Delancey*, 4 *Cowen*, 427.) The case in 16 *John*. 47, closely examined, is not authority against the defendant. The defendant shows a consideration; none was pretended in 16 *John*. 47. The deed created a conditional estate in fee, vesting presently, and defeasible by condition subsequent. (2 *Black. Com.* 154. *Co. Litt.* 201. 1 *Cowen*, 622. 9 *id.* 69.)

II. We say this deed was *valid to create* a trust for the use of the grantees during their lives. (1 *R. S.* 722, 723.)

III. The deed is valid under the revised statutes. (1 *R. S.* 738, §§ 136, 137, 138. 3 *Kern.* 517.)

IV. The answer averred a good and valid consideration, and the proof abundantly established one which was abundant to uphold and sustain the deed. 1. The acceptance by Hallenbeck of the deed, with conditions annexed, is presumptive proof of an agreement on his part to perform them. 2. A consideration for the deed was proved. (4 *Kent's Com.* 574, 7th ed. 5 *Barb.* 455. 4 *Denio*, 201.)

V. The power of this court is ample to grant to a defendant affirmative equitable relief, by way of defense. (*Crary v. Goodman*, 2 *Kern.* 266.) That the defendant had equities, will and can not be questioned.

VI. Not only by the rulings of the justice is the defendant deprived of the land, but he is required to pay for the use and occupation of it, although the plaintiff and his wife were supported not only as a full satisfaction for the use and occupation of the land, but for the fee itself. Suppose the plaintiff

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and his wife had lived and resided with, and been supported by, the defendant for six years, at an expense of \$1000, and had then died, according to the ruling of the judge at the trial, the defendant must then give up the land and pay for the *use and occupation*.

VII. The answer set up all the facts, and the judge erred in allowing a recovery for use and occupation.

*Henry Smith*, for the plaintiff. I. The deed from Ezra Spalding and wife to Hallenbeck was without any consideration, and is inoperative and void. It vests no estate in the grantee. (1.) The deed upon its face shows that there was no consideration. (2.) It is a mere conditional conveyance, to be in force only for such time as the grantees shall support the grantors. (3.) This being the only consideration stated in the deed, and the deed not saying for other considerations, none other than the one expressed can be shown or presumed. (*Jackson v. Delancey*, 4 Cowen, 427.) (4.) Taking the whole deed together, the inference is irresistible that Hallenbeck never bound himself, by any covenant or agreement which could be enforced, to support or maintain the grantors. If there was such an agreement, it was for the defendants to show. This not being shown, the deed was, within all the authorities, without consideration and void. (*Jackson v. Florence*, 16 John. 46. *Jackson v. Delancey*, 4 Cowen, 427. *Schott v. Burton*, 13 Barb. 182. *Palmer v. Fort Plain and Cooperstown Plank Road*, 1 Kern. 387.)

II. There is nothing in the exception to the rejecting of the evidence offered, to show the value of the maintenance of the grantor and his wife. (1.) The right to recover for use and occupation, while grantors or either of them were maintained by defendants, was waived. (2.) No such defense was set up in the answer. (3.) No set off could be made of such a claim, in this form of action.

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*By the Court*, GOULD, J. In a late decision of this court, we have held that there must be a consideration for every deed; and that for a deed of bargain and sale, that consideration must be what the law calls a valuable one, as contradistinguished from what it styles a good consideration. And also, that by the earlier decisions, as well as by the latest, such consideration may be either expressed in the deed, or proved independently of it. It is also true, that where a particular consideration, and that only, is expressed in a deed, it cannot be contradicted by proof that there was not that consideration, but that there was a consideration totally different from the expressed one. But proof of a further consideration superadded, does not contradict the deed, and is allowable; and it may be that by such consideration the deed will be sustained.

At common law, (before the courts of equity raised the doctrine of uses,) it was not necessary that any consideration should be expressed in a deed, for that the deed implied one. (*Plowd.* 308. 4 *Cruise's Dig.* 24.) But, by the doctrine of uses, a conveyance without consideration expressed, was treated as voluntary, transferring indeed the *legal estate* to the grantee, but leaving the *beneficial interest* in the grantor; and thus such a deed was held, in equity, to enure to the benefit of the grantor. (*Rob. on Fraud. Conv.* 85. 2 *Black. Com.* 136, 271, 2, 327-330.) Then came the statute of uses (27 *Henry 8th*) which *executed the use*, and transferred the *legal estate* to him who had the *beneficial interest*, so that, under that statute, a conveyance without consideration expressed would, at law, enure to the benefit of the grantor, by giving him the legal title, or rather, not passing it from him. (2 *Black. Com.* 296, 332, 3. *Perk.* § 533.) Yet, if such a deed declared a use to a third person, it could not enure to the benefit of the grantor; *expressum facit cessare tacitum*; and the *implied* use became impossible, because declaring the use to be to a third person, shows that a use to the grantor was *not* intended. It is negatived by the terms

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of the deed. In this country, however, it has been held by good authority, that in those states where this doctrine of uses never obtained, the ancient English statute of uses having nothing on which to operate, constituted no part of the common law of such states; and that there, a deed without consideration expressed, does *not* enure to the benefit of the grantor, but passes the title, legal and equitable.

These two principles would seem to limit any possible rule, that the grantor takes the benefit of a deed without consideration, so that it cannot be applicable to either of these two cases: 1st. Where, on the one hand, the law of the state implies no such use, from the absence of consideration; and, 2d. Where, on the other hand, the deed itself, 'on its face, shows an intent that it should *not* enure to his benefit. I am not aware how far the doctrine of uses ever prevailed in this state, or whether it prevailed at all. But it is true, that so far as express uses not sanctioned by our present law are concerned, our statutes are substantially equivalent to the statute of uses, and execute the use. (3 R. S. 15, §§ 47, 49, 5th ed.) Yet, however that may be, I see no reason for not keeping the rule within the limits above. And in the case before us, the intent is plain, upon the face of the deed, that the grantors were to have a benefit therefrom *different from*, and *inconsistent with*, their retaining the title. They meant to secure a support for their lives, which is equivalent to a *life annuity* as the purchase price; and such a consideration has pecuniary value—is a valuable consideration. It is further true in this case that the proof is, that the defendant Hallenbeck entered into possession under the deed, and *performed* the condition, or consideration, named therein, by supporting the grantors; the voluntary leaving, of Ezra Spalding, after his wife's death, not affecting that fact.

It is said, however, that *Jackson v. Florence* (16 John. 47) is entirely decisive of this case, against the defendants, and that other cases have followed it to that extent. There is no need of going, in the least degree, aside of that decision, or

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contrary to it, in order to sustain Spalding's deed, before us. The case in 16 *Johnson* needs but a careful reading, to show that it is very far from parallel to this one. So far as the clause stating the consideration is concerned, the two deeds are substantially the same. But in the subsequent part of the deeds the difference is total. The deed in the first case recites a prior agreement, *not proved* in the case, ("whereas, F. has agreed,") and then says, that "if the grantee shall perform" that unproved agreement, (that agreement *not contained* in the deed, and not *in esse* in any binding form,) "then the above conveyance to be taken and construed to all intents and purposes; in other, to be void and of none effect." And on *this* instrument the court say, "a deed of lands will be inoperative if there be no consideration to support it;" and, "in the present case, there is no pretense of consideration other than as is expressed in the deed; and we are of opinion that the deed itself furnishes no evidence of consideration. Taking the whole deed together, the inference is irresistible that the defendant never bound himself by any covenant or agreement which could be enforced, to support, &c. the plaintiff. The deed leaves it to the option of the defendant, either to support the lessor, or suffer the deed to become void, by withholding the support. If there had existed any agreement by which the defendant was bound to support the lessor, it was incumbent on the defendant to produce it; but, in the absence of such agreement, we are bound to say there was no consideration for the deed."

If then there be, in *Spalding's deed*, a binding agreement by Hallenbeck (which can be enforced) to support the plaintiff, that is a sufficient consideration to support the deed; though it be a deed of bargain and sale. (See also 9 *Cowen*, 69.) To ascertain whether there be, note the words of the deed, how totally they differ from those above cited; "the consideration of the above conveyance is, that the above named David Hallenbeck *is to*, and *agrees to*," (that is, *hereby agrees to*), "keep, maintain and support," &c.; and *if he fail so to do*,

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the deed is to be void and the land is to revert to the grantors. Consider these words in the light of its being proved, in the case, that the grantee *accepted* the deed, and went into possession under it. "Agrees," *ex vi termini*, means that it is the agreement of *both* parties, both *concurring* on the point, whether both sign or not. And the *act of acceptance* is fully equal, in its binding effect, to any signing and sealing; and such words, in a deed-poll accepted by the grantee, make a covenant on his part, binding him and to be enforced against him, though he did not sign the deed. (*Co. Litt.* §217, n. *Cro. Jac.* 399. *Barton v. McLean*, 5 *Hill*, 258, 9. *Aikin v. Albany, Vermont and Canada R. R. Co.*, 26 *Barb.* 298. *Van Rensselaer v. Smith*, 27 *id.* 140, and cases there cited.) It appears to me that beyond question Hallenbeck was bound by these words; and might have been sued on them and compelled to furnish the support. It is true that his failing to keep his covenant would work a forfeiture; but enforcing that was not the plaintiff's only remedy. And so long as a promise to do an act, a binding agreement, is a sufficient consideration for a corresponding agreement to do some other act, or to pay money, I see no reason why such a covenant as this is not entirely sufficient to support the deed.

It seems to me there should be a new trial.

New trial granted.

[ALBANY GENERAL TERM, March 7, 1859. *Wright, Gould and Hogeboom*. Justices.]

ANN ELIZA DOYLE *vs.* RUSSELL.

Where a prisoner, arrested by virtue of a criminal warrant indorsed pursuant to 2 E. S. 707, § 5, is discharged from arrest, by a justice of the peace of the county in which he is arrested, on entering into a recognizance before him, the warrant has spent itself, and the officer has no right to arrest the prisoner again, without new process. HOGESBOM, J., dissented.

*Clark v. Cleveland*, (6 Hill, 349,) disapproved.

**M**OTION for a new trial, upon a case and exceptions. The plaintiff sued this defendant and Nelson Beardsley jointly. The complaint contained three counts. The first two counts were for false imprisonment. The third and last count was for malicious prosecution. The defendant, Russell, answered separately, pleading a justification as a peace officer acting under and by virtue of a warrant duly issued, &c. against the plaintiff for petit larceny. The following facts appeared from the testimony: The plaintiff had been a domestic in the employment of Beardsley. The day she left his house he missed a *trunk* and other articles from his premises; and made complaint and procured a warrant from John O. Cole, Esq., police justice of Albany, against the plaintiff for petit larceny.

The defendant, Russell, was a deputy sheriff of Albany county, and went with Beardsley to Schoharie county, where the warrant was indorsed for service there, by R. Brewster, a justice of the peace, and then delivered to Russell with instructions to arrest the plaintiff. They found the plaintiff, with the trunk in her possession, in Cobleskill. The defendant, Russell, arrested the plaintiff, and went with her before Christopher Wetsell, a justice of the peace of Schoharie county, where she entered into a recognizance to appear at the court of sessions of Albany county, to be held on the second Tuesday of September, 1857, and thereupon was discharged from arrest, by said justice. No court was held or appointed to be held for Albany county on that day. The justice never returned the recognizance, but lost the same. He did not indorse upon the warrant the proceedings had be-

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fore him. The defendant Russell subsequently, and after the second Tuesday of September, 1857, by virtue of the same warrant, which he had in his possession, re-arrested the plaintiff in Albany county, and took her before J. O. Cole, the magistrate issuing the warrant.

The judge, among other things, charged the jury as a matter of law, that when Justice Wetsell assumed to discharge the plaintiff, upon the recognizance being taken before him, the warrant under which she was arrested had spent itself, and the defendant had no right to arrest her again without new process. To which portion of the charge the defendant excepted. The defendant's counsel requested the court to charge that if they found from the evidence, that at the time of the second arrest, the defendant had good cause to believe the plaintiff had been guilty of the crime of larceny, the fact should be taken into consideration in mitigation of damages. The court refused so to charge, but stated to the jury that they had a right to consider, in mitigation of damages, that the defendant Russell supposed the warrant was valid and authorized him to arrest her. To which refusal the defendant's counsel excepted. The counsel for the defendant further requested the court to charge, that if property was stolen from the defendant Beardsley, and he had cause to suspect the plaintiff to have committed the crime, it was not only his privilege, but it was also his duty as a citizen, to procure her arrest. The court charged accordingly. The jury found a verdict in favor of the plaintiff, against the defendant Russell, for \$75.

*W. S. Hevenor*, for the defendant Russell.

*Fox & Holmes*, for the plaintiff.

GOULD, J. There is really but one point to be considered in this case, as presented by the exceptions and points; and that is, whether the warrant was spent by the first arrest, (in

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Schoharie county,) and the action had thereon. If it was, the decision at the circuit was right; but if, notwithstanding what was there done, the warrant remained in force so that another arrest could be made under it, the second arrest was not false imprisonment. And as it is by no means well settled, on authority, that the warrant remained in force, for the second arrest, I propose to look into the circumstances attending the two arrests, for two purposes: 1st. Because in the cases referred to, the decisions have partly, if not chiefly, turned on the circumstances of each case; and 2d. Because, as the complaint is for malicious prosecution as well as for false imprisonment, those circumstances may throw light upon the *quo animo* of the proceeding; and even may have a very decided bearing on the right to recover on the count for false imprisonment.

It appears that the plaintiff, having left the service of Mr. Beardsley, (who was a deputy sheriff,) was followed to her home in Schoharie county, by himself and another deputy sheriff, with a warrant to arrest her for petit larceny, issued on his complaint that she had stolen his property to the value of some \$4. She is arrested in Schoharie county, and taken before a magistrate to give bail to appear at the next court, having cognizance of the offense, to be held in Albany county. On the magistrate's asking what court that is, these two deputy sheriffs give him the information, specifying the proper court, but naming its term at a time when no term thereof was to be held. And she, and her bail, as well as the magistrate, in entirely good faith, perfect a recognizance for her appearance at Albany, on the day named; and on that day she and her bail travel some 40 miles to Albany, to appear and answer to the charge, but find no tribunal. On her return, and at the distance of some 14 miles from Albany, she is arrested on the same warrant, and with unnecessary and degrading force is brought back to Albany, imprisoned four days, tried before the justice who issued the warrant, and unhesitatingly acquitted. These circumstances are not all printed

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in the case ; (I suppose under the rule of putting in only what relates to the exceptions ;) but they were on the argument stated on one side, and not contradicted on the other.

The arrest in Schoharie county was undoubtedly regular, and the magistrate there had authority to take bail ; and the mistake, by means of which the recognizance was for a wrong day, was that of the complainant and the officer. So far, certainly, there is no attempt on her part to evade or escape justice ; nor is there any such attempt in her attending with her bail, when required by the recognizance. Still there can be no doubt that the recognizance was inoperative, perhaps absolutely void ; though I think there may be an error in the defendant's citation of authorities on this point. If void—and I am disposed to hold that it was—it was an escape, voluntary on the part of the officer *and the complainant* ; and whatever public justice might require, the complainant could not object to his being put to the trouble of procuring a new warrant if he desired a further arrest.

I am referred to *Clark v. Cleveland*, (6 Hill, 349,) as covering the whole of the principle claimed by the defendant, and deciding the warrant to be in force, notwithstanding the first arrest. This case certainly so decides. But it cites cases which do *not* support it ; and I am unable to accede to the justness of its reasoning ; especially when the *civil* cases cited fail to sustain the analogy claimed ; and the *criminal* ones are the other way. Hawkins (2 Hawk. P. C. ch. 13, original sec. 9) says, "If a constable, after he hath arrested the party by force of any warrant of a justice of the peace, suffer him to go at large, upon his promise to come again at such a time and find sureties, he cannot afterwards arrest him by force of the same warrant. However, if the party return and put himself again under the custody of the constable, the constable may lawfully detain him." And in this section is found most of the reasoning of the case in 6th Hill. The latter case (besides Hawkins) cites 1 Esp. Rep. 218, and Peake's N. P. Cas. 234, same case. It is more fully reported in Espinasse, where the

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reporter says, "it appeared to be rather on the ground of the *plaintiff's having consented* that the warrant should *remain in force* until the second surety to the parish was perfected, than as holding the second arrest under the warrant to be legal." And Lord Kenyon (in giving the *nisi prius* decision, of which the reported case is a review on a motion, in banc, for a new trial,) says the warrant continued in force until the parish obtained the object of the original complaint. That in the case it appeared that that object had not been performed, as the plaintiff had not found two sureties, as he had undertaken, and that the second arrest was therefore justified by the warrant. And in the statement of the case it appears that "as he had undertaken" referred to the fact that at the time of the first arrest, the plaintiff "*had consented* that the first warrant should remain in force, till the bond was executed by the *second* surety." Thus this case goes a step beyond Hawkins, where the consent was required to the second arrest; but stops very far short of the case in 6th Hill; for which it surely is not an authority.

It seems to me that the doctrine of that case (6 *Hill*) is eminently dangerous to the citizen, as well as eminently calculated to make officers corrupt and arbitrary. The power to arrest, at the most annoying and oppressive time, and in the worst manner; and voluntarily to let the prisoner go, without any understanding that he shall consider himself under arrest; to extort money for so doing; and then, with the same warrant, to be able to retake the prisoner against his will, and as oppressively as before, seems to me a doctrine so monstrous, that no argument, based on the blunders of officers or magistrates, as likely to leave public justice robbed of its subjects, can for a moment lead courts to sanction it. Were the point settled by a course of decisions, anywhere; did it not remain standing upon a solitary case, which is itself not sustained by its citations, I might feel bound to submit, and to abide by the effect of the doctrine *stare decisis*, on the ground that what was so well settled must be right, although I might not

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be able so to see it. But where the liberty of the citizen is concerned, and no hardship is imposed upon the law, by compelling it to see that its own officers are faithful and competent, I think I am justified in saying that the case may go to a higher tribunal for a decision which I cannot see it right to give.

It may, however, be proper, in view of the alleged peculiar circumstances of this case, (the tying &c.,) that I should add, that a decision that the warrant remained good for the second arrest, does not necessarily determine this case for the defendant. For it has been held by high authority, that "if cruelty, malice and oppression appear to have occasioned or *aggravated* the imprisonment, they shall not cover themselves with the thin veil of legal forms, nor escape under the cover of a justification, the most technically regular." (1 *Term R.* 536, 7.) From this case *Espinasse*, in his *Digest*, (p. 332,) quotes as a principle: "though the original arrest might be warrantable, yet for any subsequent oppression or cruelty, this action (false imprisonment) lies."

I should not grant a new trial.

HARRIS, J., concurred.

GOULD and HOGEBOOM, JS., dissented.

New trial denied.

[ALBANY GENERAL TERM, March 7, 1859. *Harris, Gould and Hogeboom, Justices.*]

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AKIN and SCHUYLER vs. THE WESTERN RAIL ROAD CORPORATION.

By the act of the legislature, passed in 1840, (*Laws of 1840, p. 80.*) granting authority to the Albany and West Stockbridge Rail Road Company to construct one or more *depots* in the city of Albany, and to connect the same with its rail road by a single or double track; and thus, in effect, empowering the company to extend its road from Greenbush to Albany, the rail

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road company has the right to carry passengers from Albany to Greenbush, as well as over any other portion of its road.

There is nothing in that act, or in the agreement subsequently made between the corporation of Albany of the first part, the Albany and West Stockbridge Rail Road Company of the second part, and the Western Rail Road Corporation of the third part, bearing date April 23, 1840, which prohibits the Western Rail Road Corporation from carrying passengers from Albany to Greenbush, any more than from Albany to any other station on the line of the road.

The carrying of passengers across the river, between Albany and Greenbush, by the Western Rail Road Corporation, upon ferry boats, free of charge, is not a violation of the rights conferred upon B. Akin and S. Schuyler, by a grant to them from the corporation of Albany, made on the 1st of October, 1852, of the exclusive right of ferriage between Albany and Greenbush, for the term of twelve years.

THIS was a case submitted to the court without action, pursuant to the 372d section of the code. The facts agreed upon by the parties are as follows: By an act of the legislature, passed in 1836, (*Sess. Laws of 1836, p. 361,*) the Castleton and West Stockbridge Rail Road Company was authorized to make the western termination of its road at a point opposite to the city of Albany, in the town of Greenbush, and the name of the corporation was changed to the Albany and West Stockbridge Rail Road Company. By another act, passed in 1840, (*Sess. Laws of 1840, p. 80,*) the company was authorized to construct one or more *depots* in the city of Albany, and to connect the same with its rail road by a single or double track, *with the consent and approbation of the corporation of the city*, but it was declared that the act should not be so construed as to authorize the company to construct a bridge across the Hudson river, or in any manner to obstruct its navigation. By an agreement between the corporation of Albany of the first part, the Albany and West Stockbridge Rail Road Company of the second part, and the defendants of the third part, and bearing date the 23d day of April, 1840, the corporation of Albany gave their consent and approbation for the construction by the defendants, who by virtue of the same agreement, became the lessees of the Albany and West Stock-

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bridge Rail Road Company, of one or more *depots* within the city of Albany, and to connect the same with their rail road by a single or double track, &c., upon the terms and conditions prescribed in the act of April 13th, 1840. The agreement also contains a provision in the following words: "And the said party of the first part further agrees that no charge shall be made to the said party of the third part for the right and privilege, at their own expense, to carry across the Hudson river, at Albany, the passengers and freight transported or to be transported upon said rail road, or the officers, agents and servants of said party of the third part, or their engine, cars or other property."

The rail road of the defendants terminates at a point on the eastern shore of the Hudson river in the town of Greenbush, opposite to the original four wards of the city of Albany, and is connected with the city by means of ferry boats running from said termination across said river to the foot of Maiden Lane, a point within the limits of the original four wards of the city and its original bounds as established by the charter of Governor Dongan. The defendants are in the habit and practice of carrying across the river, on their ferry boats, other persons, teams and carriages than such as are specified in the agreement, free of any charge therefor, and which would necessarily cross the river by means of the plaintiffs' ferries, but for such carriage by the defendants; but such persons, teams and carriages are not solicited or excluded by the defendants. The defendants maintain their ferry for rail road purposes exclusively. No ferriage is charged or collected of any body.

On the first day of October, 1852, the corporation of Albany granted to the plaintiffs, for the term of twelve years, at an annual rent of \$2250, the exclusive right, license, privilege and franchise of ferrying on each side the Hudson river from the east bounds of the original four wards of Albany to Greenbush, excepting, however, any right of ferriage before granted, or which might thereafter be granted to any rail road company whose road is or may be terminated, or constructed

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along the east shore of the Hudson river, opposite said original four wards, which rights should not be extended beyond the passengers, freight, agents and servants carried, or to be carried upon such roads, or in the service of such companies.

The plaintiffs claimed that the carriage of persons, passengers, teams and carriages, other than such as are mentioned and specified in the agreement aforesaid, is a violation of their rights. They asked that the defendants might be adjudged to account for the loss and damage sustained by the plaintiffs, and that they might be restrained from further violating their rights.

*J. I. Werner*, for the plaintiffs.

*C. B. Cochran*, for the defendants.

*By the Court*, HARRIS, J. The Dongan charter, after reciting that the inhabitants of Albany had "established and settled *one ferry* from the town of Greenbush, situated on the other side of Hudson's river, for the accommodation and conveniency of passengers, the said citizens and travelers, granted, ratified and confirmed unto the inhabitants, who were thereafter to be called 'The Mayor, Aldermen and Commonalty of the city of Albany,' the aforesaid ferry;" and also, "full license, power and authority to establish, appoint, order and direct the establishing of all ferries in and throughout the said city, or leading to the same, necessary, needful and convenient for the inhabitants of said city and the parts adjacent, and for travelers there." By virtue of this grant, the ferry then existing, and which still exists, at the foot of Ferry street, became vested in the corporation of Albany. The corporation was also authorized to establish other ferries, but I find nothing in the charter which makes this power exclusive. On the contrary, notwithstanding the provision in the charter, vesting in the corporation the power to establish

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ferries, I think it would have been competent for the legislature also to exercise the same power.

But this power was rendered exclusive by the 48th section of the act of April 13, 1826, (*Sess. Laws of 1826, p. 201.*) which declares that the right of ferry granted by the charter of the city to the mayor, aldermen and commonalty thereof, shall be so construed as to vest in the said mayor &c. "the *sole and exclusive* right of establishing, licensing and regulating all ferries on each side of the Hudson river, leading from Greenbush opposite the east bounds of the original four wards of the said city, to the city." (*See also Sess. Laws of 1842, p. 361, § 76.*) Whatever might before have been the construction of the provisions of the charter relating to ferries, this statute is a mandate from the legislative power, requiring all courts to construe that charter as vesting in the corporation of Albany the sole and exclusive right of establishing, licensing and regulating ferries across the Hudson river opposite the original boundaries of the city. The legislature has not assumed to exercise any such right. All that it has done, is to authorize the rail road company to construct one or more *depots* in the city of Albany, and to connect the same with their rail road by a single or double track, with the consent and approbation of the corporation of the city, which consent and approbation was obtained. The defendants, therefore, have acted as well under the authority of the corporation of Albany as of the legislature.

The act of 1840, in effect, authorized the rail road company to extend its road from Greenbush to Albany. The language of the section conferring this power seems to contemplate that this was to be effected by means of a bridge. The authority granted is to construct one or more *depots* in Albany, and to connect these with their road by a single or double track. Whether this is to be done by a bridge or a tunnel or a ferry is not indeed suggested, yet, were it not for the restriction in the last clause of the section, which declares that it shall not be so construed as to authorize the construc-

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tion of a bridge across the river, a bridge might have seemed the most natural and practicable mode of accomplishing the thing authorized to be done.

But whether this object is effected by means of a bridge or a ferry, the defendants have the right to carry passengers from Albany to Greenbush, as well as over any other portion of their road. Their franchise extends from Albany to the Massachusetts line. There is nothing in the act of 1840, or the agreement subsequently made between the parties, which prohibits the defendants from carrying passengers from Albany to Greenbush, any more than from Albany to any other station on the line of the defendants' road. Nor is it a question which concerns the plaintiffs, whether the defendants charge fare for carrying their passengers from Albany to Greenbush, any more than whether they charge fare for carrying passengers upon any other part of their road.

Suppose the clause in the act of 1840 which prohibits the rail road company, in extending their road to Albany, from building a bridge, were to be stricken out, and the defendants were to substitute a bridge for their boats, could it be pretended that they would be liable for an infringement of the rights of the plaintiffs, because they allowed persons or even carriages to pass over it? The plaintiffs are the proprietors of a ferry; their right is *exclusive*. This is conceded. No other person has a right to establish a ferry across the Hudson opposite the original boundaries of the city. A ferry, when considered as a franchise, consists in the right, arising from grant or prescription, to have a boat or boats for carrying men and horses across a river *for reasonable fare or toll*. (*Burrill's Law Dic. Ferry*.) Bouvier defines a ferry to be a place where persons and things are taken across a river or stream in boats or other vessels *for hire*. The franchise consists in the right to exact toll, and this right involves the corresponding obligation of maintaining the ferry and carrying such persons as apply and pay their fare. But suppose a gentleman residing on either side of the river should choose to

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maintain his own boat, and should, as often as occasion might require, cross the river with his family and friends, could it be pretended that, by so doing, he was violating the exclusive privilege of the plaintiffs? It would be very likely to diminish their tolls a little; but if so, it could but be regarded as *damnum absque injuria*. Suppose again that this same gentleman should find upon his boat, when about to cross, other persons. They were not there by his solicitation, but aware that he had a boat about to cross the river, and themselves desirous of crossing, they had, uninvited, entered upon the boat, awaiting the owner's pleasure, to cross the river; will it be claimed by the plaintiffs that the owner of the boat, before he ventures to cross, himself, must, at the peril of an action, expel the persons who have thus intruded themselves upon him? What more have the defendants done? They carry across the river, upon their boats, persons, teams and carriages. These come on board without solicitation; they pass over without molestation. No leave is given; no exclusion is attempted; no toll or fare is received. Can it be that this is a violation of the plaintiffs' exclusive right to maintain a ferry?

I am unable to see that the provisions in the agreement of April, 1840, whereby the corporation stipulates that no charge shall be made to the defendants for the right and privilege, at their own expense, to carry across the Hudson river the passengers and freight transported, or to be transported, upon their rail road, or their officers, agents and servants, or their engines, cars or other property, has any bearing upon the question under consideration. Indeed, I do not perceive the object of the parties in having such a provision inserted in the agreement. Certainly, in the present state of things, it can in no way affect the rights of either party. It seems to imply that while the corporation is to have no claim upon the defendants, in the cases specified in the agreement, there might be other cases in which some claim might justly be made. Perhaps the parties had in view some future arrange-

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ment, whereby the defendants should, indeed, set up a regular ferry, transporting passengers from shore to shore for hire, and for which right and privilege the corporation might be entitled to compensation.

The agreement of the first of October, 1852, between the plaintiffs and the corporation of Albany, cannot affect the rights of the defendants. The plaintiffs thereby became the lessees of the corporation, and, as such, may maintain any action and obtain any relief to which the corporation would have been entitled, had no such agreement been made. The rights of the parties must be determined by the state of things existing after the execution of the agreement of the 23d of April, 1840.

Upon a careful examination of the case, I am unable to perceive any ground upon which relief can be granted to the plaintiffs.

I am, therefore, of opinion that the defendants are entitled to judgment.

[ALBANY GENERAL TERM, May 4, 1857. Wm. B. Wright, Harris and Gould, Justices.]

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POST vs. HOVER and others.

A testator, by the 2d clause of his will, devised a part of his homestead farm to his three grandchildren, Erastus, Mary E. and John Hover, share and share alike, but subject to the payment of debts and legacies, and to the conditions thereafter stated. These conditions were, that they, being minors, were not to *take said estate* until they should severally arrive at the age of twenty-one years; with a further provision that in case of the death of either before that age and without issue, the survivors or survivor should take such share; and in case of the death of all, under age and without issue, it should go to the testator's son John in fee. The testator then directed that during the minority of the grandchildren his son John should *take charge of*, and have the *management* of the said estate, and out of the *avails* should *support* the grandchildren and their mother; and he appointed

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his son John their *guardian*, and as such guardian he was to have charge of their estate. Out of the surplus of the avails of the estate, over and above such support, (if any,) his son John was directed to pay the debts and legacies charged thereon; and, after doing so, to invest at interest any surplus that might remain, for the use and benefit of the grandchildren, to be paid over to them at the age of twenty-one. He was not to be made liable or accountable for losses in the *management* of the estate, unless for gross neglect, &c. The testator also directed that so long as Mary H., the mother of his said grandchildren, and the widow of his deceased son Peter, should remain the widow of his son, she should remain in the testator's mansion house and superintend the household affairs, and be supported out of the avails of the property devised to the grandchildren.

*Held* 1. That the intent of the testator, as appearing from the terms of the devise, was as follows: 1. A devise of the real estate to the three grandchildren, in fee, to take effect in possession on their arriving at the age of twenty-one years. 2. In case either of them should die before the age of twenty-one and without issue, a devise over to the survivors, and if they should all die, to the testator's son John, in fee. 3. A devise of the fee in trust, by implication of law, to John, during the minorities of the grandchildren, and until the youngest grandchild should arrive at the age of twenty-one years.

2. That the trust or direction to the testator's son John to manage and control the estate, and receive and apply the avails thereof, during the minorities of the grandchildren, was *void*, as involving, necessarily, a suspense of the power of alienation during the minorities of the *three* grandchildren. And that the trust was not saved, as a valid trust, by the provisions of section 55 of 1 E. S. 728.
3. That the whole devise, including the illegal trust, was not so closely interwoven, in its several parts, but that the valid could be detached from the void provisions, and preserved, without doing violence to the testator's intentions.
4. That the main devise to the infant grandchildren and to the testator's son John, was valid; and that the same took effect during the respective minorities of the grandchildren, as well as afterwards. And that the estate vested in the grandchildren immediately on the death of the testator, subject to be divested or determined by their death under age and without issue.
5. That the provision for the residence of the mother of the infant devisees in the mansion house of the testator, and for her support out of the avails of the estate, during her widowhood, was valid.
6. That during the minorities of the grandchildren the estate descended to the infant devisees of the testator, subject to the charges named in the will, including the charge for the residence and support of the widow.
7. That in all other respects the provisions of the will were valid, and capable of being enforced.

The courts have latterly leaned more and more to the preservation of such parts

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of a will as may be separated from the rest without a disruption of the whole. *Per HOGGBOOM, J.*

It is a well established rule that where the devises are distinct, or one part can safely be detached from another, without disturbing the relation or continuity of the whole, it should be done. *Per HOGGBOOM, J.*

THIS action was brought to obtain a judicial construction of a portion of the last will and testament of John Hover, deceased. It was tried at the Columbia circuit, held in September, 1858, Hon. GEO. GOULD, J. presiding, who directed that a verdict be entered against the plaintiffs, establishing each and all the provisions of the said last will and testament which are in controversy in this suit, subject to the opinion of this court at a general term. The portions of the will sought to be questioned are as follows:

"*Secondly*: I give, devise and bequeath unto my three grandchildren, viz. Erastus Hover, Mary Elizabeth Hover and John Hover, infant children of my son Peter, all that part of my homestead farm, so as to include the dwelling house, out buildings and orchard, I purchased of the widow Rouse. Said tract is bounded as follows: (*Here described by metes and bounds.*) To have and to hold the same to my said three grandchildren above named, share and share alike, subject, however, to the conditions hereinafter stated, and to the payment of all my just debts and funeral expenses, and to the payment of all such legacies as I shall charge upon this part of my estate so devised to my said grandchildren.

Whereas, the three grandchildren above named, to whom I have devised that portion of my homestead farm, are now all minors under the age of twenty-one years: now it is my will and pleasure that they are not to take said estate until they severally arrive to the full age of twenty-one years; and in case of the death of either of them before arriving to the age of twenty-one years without issue lawfully begotten, the survivors or survivor of them to take the share of such as may die without issue before a division is to take place; and should all of said three grandchildren above named happen to die, without leaving lawful issue, before they arrive to the full age

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of twenty-one years, then and in such case, I give said real estate to my son John Hover, his heirs and assigns for ever.

It is my further will and pleasure, and I do so order and direct, that during the minority of said three grandchildren, my son John Hover shall take charge of, and have the management of, that part of my real estate immediately after my decease, and out of the avails of said estate my said son John shall support my said grandchildren and their mother Mary, if she remain single; and I do hereby nominate, constitute and appoint my son John Hover, guardian of my said three grandchildren above named, during their minority, and as such guardian to have charge of their estate.

And whereas, I desire to make provision for the support of my daughter-in-law Mary Hover, widow of my deceased son Peter: now it is my will that so long as Mary Hover, the widow of my deceased son Peter, shall remain single and continue the widow of my said son, she shall remain in my mansion house and superintend the household affairs, and be supported out of the avails of that part of my estate herein devised to my three grandchildren above named, children of said Mary and Peter Hover; but in case she should again intermarry, then the provision for the support and maintenance is to cease, and she no longer will be permitted to remain in my said mansion house or upon my said farm; and in case of the death of all my said three grandchildren without issue before they arrive at the full age of twenty-one years, so that the said real estate should fall to my son John, as above stated, then I direct that upon the happening of such an event that my son John Hover shall pay over to my daughter-in-law Mary, widow of my deceased son Peter, the sum of one thousand dollars, which shall be in full of her maintenance and support, and in full of all claims she might have against my estate.

It is my further will and pleasure, and I do so order and direct, that my son John shall, after supporting my said three grandchildren and their mother, if there shall be any surplus

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arising from the avails of this part of my estate devised to them, pay and discharge the debts and legacies charged thereon ; and after the payment of all debts and legacies charged thereon, then I direct that my said son shall invest at interest such surplus for the use and benefit of my said grandchildren, to be paid over to them when they severally arrive to the full age of twenty-one years, share and share alike.

*Item :* Whereas, I have in this my will directed my executors to pay all my debts, funeral expenses and legacies, out of my personal estate, and have also made them liens upon that portion of my homestead devised to my three grandchildren, heirs of my son Peter : now to enable them to meet the payment of all the debts and legacies, I give and devise all the rest of my personal estate, not otherwise devised, unto my said three grandchildren, viz. Erastus Hover, Mary Elizabeth Hover and John Hover, heirs of my son Peter, share and share alike ; subject however to the payment of all my debts, funeral expenses and the legacies devised to my daughters and my son John, and which I have charged upon my homestead farm, devised to my said three grandchildren ; but I desire to have it fully understood, that my said three grandchildren last named are not to enter into the possession of any part of the real estate devised to them until the youngest child shall arrive to the age of twenty-one years. But in regard to the personal estate I have devised to them, they shall take and receive their several shares or portions as soon as they each arrive at the age of twenty-one years."

Upon the above clauses of the will, the plaintiffs in their complaint raised the following questions :

1st. Whether the devise of that portion of the testator's homestead farm described in the second item of the testator's will, to his three grandchildren, Erastus Hover, Mary Elizabeth Hover and John Hover, with the contingent devise of the same farm over to John Hover in case of the death of all of said three grandchildren before they arrive at the full age

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of twenty-one years without lawful issue, or any part thereof, is valid.

2d. Whether the charge and management of said farm committed to the said John Hover, after the death of the testator, and the power and discretion given to the said John Hover to dispose of the avails of the farm as given by the testator in his will, are valid or invalid.

3d. Whether both the devise to the said three grandchildren of the testator, Erastus, Mary Elizabeth and John, of a portion of his homestead farm, with the said contingent devise over to John Hover in case of the death of all three grandchildren, either with or without the trust created in John Hover over the said premises, and the avails thereof during the minority of said grandchildren, do not suspend the power of alienation of such premises for more than two lives in being, contrary to the statutes against perpetuities.

4th. If the above mentioned devises and trusts are void, what are the rights and interests of the respective parties to this suit, in and to the property covered by them; and to what extent are the other provisions of said will destroyed or affected by such devises and trusts being void.

The complaint was filed by two of the children and heirs at law of the testator (in connection with their husbands) against all the other children, heirs at law, devisees, legatees and executors of the deceased. The executors and several of the children (including the alleged trustee under the 2d clause of the will) answered the complaint, claiming the validity of all the provisions of the will. Others answered, insisting that all the provisions of the second clause of the will were void, and that the property passed to the heirs at law. Several of the defendants were infants; among others the three grandchildren, children of the testator's deceased son Peter, were infants under the age of fifteen years. All the infants appeared by a guardian ad litem and submitted their rights to the protection of the court. The will contained no residuary clause, as to the real estate. It was executed on the 28th day

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of August, 1852, and was admitted to probate by the surrogate of Columbia county, on the 26th day of February, 1858. The testator was an inhabitant of Columbia county, and died there on the 18th day of December, 1857. The real estate in controversy is located in the town of Germantown, in the county of Columbia.

*R. H. King*, for the plaintiffs.

*O. B. Cochran*e, for defendants Nicholas Burgert and others, opposing the will.

*John Gaul, jun.*, for the executors and infants, and for the defendants John Hover and others, supporting the will.

*By the Court*, HOGEBOM, J. The will in question is not altogether unambiguous in its terms. It becomes therefore important to determine the intent of the testator, before we attempt to settle the other question, whether this intent, as expressed in the will, is consistent with the rules of law.

The clause of the will more particularly in controversy devises a part of the homestead farm to his three grandchildren, Erastus, Mary Elizabeth and John Hover, share and share alike, but subject to the payment of debts and legacies and to the conditions thereafter stated. These conditions are, that they being minors, are not to take said estate until they severally arrive at the age of twenty-one years; with a further provision that in case of the death of either before that age and without issue, the survivors or survivor shall take such share; and in case of the death of all under age and without issue, it shall go to the testator's son John, his heirs and assigns for ever. One of the principal questions discussed in the case was whether this devise conferred upon the grandchildren a present and vested interest, or only a future and contingent one, depending upon their attaining the age of twenty-one. But for a single expression there would seem to be no doubt

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that the testator intended to vest in them a present estate in fee, determinable upon their death during their minority without issue. The expression which raises a doubt in my mind, upon this subject, is, that they are not to *take the estate* until they severally attain full age. I was strongly impressed on the argument with the idea, and am still inclined to think, that this clause means merely that they should not take said estate *in possession* until the time before mentioned. For although the language is absolute and unqualified, that they shall not take the estate, it is susceptible of being referred to the question of *possession* as well as of *interest*, without doing violence to the terms of the will; and looking at the whole will, this seems most consonant to the testator's intentions. His object was to give them the property—except in the contingency before mentioned—and to provide for their support and that of their mother during the period that their tender age and inexperience should disqualify them for taking charge of the property. During this period the revenues of the estate are directed to be applied and husbanded for this object, and the surplus, if any, is to be invested for their benefit. Again, in a subsequent part of the will, the time of their taking possession of the estate is postponed until the youngest grandchild attains the age of twenty-one years; the time of their taking the estate having been fixed by the previous clause, at the period when they should *severally* attain the age of twenty-one years. As the will therefore admits of this construction without violence to its language, and such construction harmonizes best with the intention of the testator, so far as it can be collected from other parts of the will, I conclude that according to the terms of this clause of the will the estate vested in the grandchildren immediately upon the death of the testator, subject to be divested or determined by their death under age and without issue.

But there is another clause of the will which demands particular notice. The testator directs that during the minority of the grandchildren, his son John shall *take charge* of

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and have the *management* of the said estate, and out of the *avails* shall *support* the grandchildren and their mother; and he appoints his son John their *guardian*, and as such guardian he is *to have charge of their estate*. Out of the *surplus* of the *avails* of the estate over and above such support, (if any,) John is directed to pay the debts and legacies charged thereon, and after doing so to *invest* at interest any surplus that may remain, for the use and benefit of the grandchildren, to be paid over to them when they shall severally arrive to the full age of twenty-one years. He is not to be made liable or accountable for losses in the *management* of the estate, unless for gross neglect, provided he does the best he can, which is left wholly to his sole judgment.

These provisions do not contain any express and specific devise of the estate. They may possibly be executed by persons charged with a mere *power* or *authority* over the estate, but they are more consistent with those large and discretionary powers conferred upon trustees, and strongly partake of the qualities and characteristics usually vested in functionaries of that description. Besides, in order to execute the authority conferred by the will, it is essential that John should have the possession of the lands, and the control of and the title to the rents and profits of the estate. And by statute, every such person shall be deemed to have a legal estate in the lands. (1 R. S. 727, § 47.) And powers very similar to, if not absolutely identical with those contained in this instrument, have been held to create a trust and to vest a legal title in the trustees by implication, to enable the trustees to collect and receive the rents and profits and income of the property, apply them to the purposes of the trust, and accumulate the surplus, as directed by the will. (*Bradley v. Amidon*, 10 Paige, 241, 2. *Leggett v. Perkins*, 2 Comst. 305. *Brewster v. Striker*, Id. 30 to 36. *Leggett v. Hunter*, 19 N. Y. Rep. 445.) There was, therefore, a trust created by the terms of the will, in the testator's son John, and he must be held to have been intended

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to be vested, as trustee, with the legal estate. And it was to continue during the minorities of the children.

The terms of the devise, therefore, as expressed in the will, appear to be as follows: 1. A devise of the real estate to the three grandchildren in fee, to take effect in possession, on their arriving at the age of twenty-one years. 2. In case they die before twenty-one, and without issue, a devise over to the survivor, and if they all die, to John, (the testator's son,) in fee. 3. A devise of the fee in trust, by implication of law, to John, during the minorities of the grandchildren, and until the youngest grandchild shall arrive at the age of twenty-one years. Let us now see how far these provisions are consistent with the rules of law.

But for the restrictive clause in the will, that the infant devisees should not take the estate until they came of age, and the trust estate created by the will during the intervening period, the devise to them would take effect immediately, and would vest in them a determinable fee. (*Maurice v. Graham*, 8 Paige, 483. *Pond v. Bergh*, 10 id. 140. *Hunter v. Hunter*, 17 Barb. 29. *Christie v. Phylfe*, 19 N. Y. Rep. 344.) But, as before stated, the clause in question postpones the vesting of the estate in possession until the devisees reach their majority. And another clause vests the estate, in the mean time, in John Hover, the son of the testator, as trustee. This estate is *inalienable*. Its alienation would be in contravention of the trust, and is forbidden by statute. (1 R. S. 730, § 84, [65].) The interest of the beneficiaries in the rents and profits is equally inalienable. (§ 82, [63].) There being, then, no persons in being by whom an absolute fee in possession can be conveyed, there is a suspense of the power of alienation, according to the statutory definition. (1 R. S. 723, § 14.) This suspense necessarily continues for the minorities of the *three* grandchildren. The trust continues for that length of time; at least, such is my understanding of the terms of the will. It is therefore

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void. (*Amory v. Lord*, 5 *Selden*, 416. *Hawley v. James*, 16 *Wend.* 61, 71, 171, 210, 225. *Lang v. Ropke*, 5 *Sandf. S. C. Rep.* 363.)

This trust is not saved as a valid trust, as the defendants' counsel suppose, by the provisions of section 55 of 1 *Revised Statutes*, 728. That shows the trust to belong to a valid class, but nevertheless requires it not to violate the law against perpetuities. As this has been shown to violate that law, it must fall.

The remaining question is, must the whole devise fail, including the illegal trust, as being so closely interwoven that they cannot be separated without doing violence to the testator's intentions; or may the principal devise to the grandchildren, and in a certain contingency, to his son John, be preserved as carrying out the general intent of the testator. The courts have latterly leaned more and more to the preservation of such parts of a will as may be separated from the rest without a disruption of the whole. This is done with a view to conform, as far as possible, to the wishes of the testator; for, although it may be usually assumed that each part of a will is made somewhat with reference to all the rest, yet it is every day's practice, and a well established rule, that where the devises are distinct, or one part can be safely detached from another, without disturbing the relation or continuity of the whole, it should be done. This rule was held to be sound, and was practically acted upon by the court of appeals in the late case of *Savage v. Burnham*, (17 *N. Y. Rep.* 561.) The same rule has been enforced in several other cases. (*Darling v. Rogers*, 22 *Wend.* 483. *Kane v. Gott*, 7 *Paige*, 521; *S. C.* 24 *Wend.* 641. *Depeyster v. Clendining*, 8 *Paige*, 295. *Haxton v. Corse*, 2 *Barb. Ch. Rep.* 506.)

In the present case, I am of opinion that the same course should be pursued. The main intent of the testator was to give this farm to his grandchildren, and to put it in their possession at an age when they would have the requisite judgment to manage and control it. This purpose can be effect-

uated. He had in view a subordinate object, to wit, to employ the income of this estate as a fund, during their minority, for their support, and for the payment of debts and legacies. This latter purpose can still be subserved, if necessary, as the debts and legacies are charged upon the estate. Their support during their minority may also be drawn from the same source, as the practical effect of avoiding the trust, and affirming the direct devise to the grandchildren, will be to devolve the estate during their several minorities, as well as afterwards, upon the infant devisees of the testator before named, in case the *cy pres* doctrine before mentioned is applied. The payment of the debts and legacies will still remain to be enforced, as was the intention of the testator, primarily, out of the personal estate; and then, in case there should be a deficiency, out of this real estate. I think, further, that the clause allowing the mother of the grandchildren to reside in the mansion house and be supported out of the avails of this estate, is sufficiently disconnected from the invalid parts of this devise to be allowed to stand. The devisees will therefore take the estate charged with this incumbrance. The only particular, therefore, in which the testator's intentions will be frustrated, will be in reference to the vesting of the possession of the estate in the grandchildren during their minority. And I do not regard this as of sufficient importance to overturn the whole devise, as the estate must necessarily be administered during their minority, through the agency of a legally appointed guardian or representative, and the precise practical result designed by the testator will thus be accomplished.

There should, therefore, be a decree upholding the main devise to the infant grandchildren, and to the testator's son John, and declaring that it is to take effect during their respective minorities, as well as afterwards; avoiding the trust or direction to John to manage and control the estate and receive and apply the avails of the estate during the minorities of the grandchildren; upholding the provision for the residence

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of their mother, and her support out of the avails of the estate during the period named in the will ; and further declaring, that during the minorities of the grandchildren the estate descends to the aforesaid infant devisees of the testator, subject to the charges named in the will, and that of the residence and support of the widow ; and that in all other respects the provisions of the will be declared valid, and entitled to be enforced.

I have had some difficulty on the question of costs. It is becoming quite common to institute suits for the judicial construction of wills, and other instruments in which no other relief is sought than such construction, and in which the parties prosecuting them have no connection with, or interest in, the trust therein created, and have nothing in any aspect of the case but a mere legal estate in the premises. Of such cases a court of equity has no appropriate jurisdiction. The jurisdiction, if any, arises under the head of trust, unless some other recognized modes of relief, such as the taking and settling of an account, is coupled with a prayer for the construction of the written instrument. (*Smith v. Smith*, 4 *Paige*, 271. *Mitchell v. Blain*, 5 *id.* 588. *Wood v. Vandenburg*, 6 *id.* 277. *King v. Strong*, 9 *id.* 94. *Bowers v. Smith*, 10 *id.* 193.) In the last case, it is held that an heir at law of a testator, or a devisee who claims a mere legal estate in the property, where there is no trust, is never allowed to come into a court of equity for the mere purpose of obtaining a judicial construction of the provisions of the will (10 *Paige*, 200.) The plaintiffs are nearly in that position, and are, besides, wholly unsuccessful in the matters litigated, and the objection to the institution of this suit is taken in the answer of the principal defendants. Under such circumstances it does not seem equitable to charge the residuary estate, which passes by the will to the infant grandchildren, with the entire costs of the litigation. Nevertheless, the suit was probably commenced in good faith, and in conformity with what was supposed to be the usual practice. It is a fit

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case, I think, for exercising the discretion of the court, and for charging the plaintiffs and all the unsuccessful defendants with their own costs respectively ; those of the infant defendants to be a charge upon, and payable out of, their estate, and the costs of the executors and the trustee John Hover, to be a charge upon, and payable out of, the general fund or residuary estate, devised to these infant grandchildren above mentioned. The decree may contain a clause to that effect.

[ALBANY GENERAL TERM, September 5, 1859. *Wright, Gould and Hogeboom, Justices.*]

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 CLEMENTS vs. GEROW.

## RYDER vs. GEROW.

## CARPENTER and others vs. GEROW.

A statement, upon which a judgment by confession is entered, in these words :

" This confession of judgment is for a debt justly due to the plaintiff, arising upon the following facts : for money lent and advanced by said plaintiff to me on the 1st day of April, 1856, and interest on the same from the 1st day of April, 1857," is defective, in not showing that the sum for which judgment is confessed " is justly due or to become due ;" that is, that the sum confessed does not exceed the debt or liability.

So, a statement in this form : " This confession of judgment is for a debt justly owing from me and due to the plaintiff, arising from the following facts : for money borrowed by me, of him, in June, 1855, for which I gave him my note, and one year's interest thereon," is defective for the same reason.

So also, *held* of a statement as follows : " This confession of judgment is for a debt justly due and owing from me to the plaintiffs, for goods, wares and merchandise, groceries, dry goods, salt, calico, muslin, molasses, sugar and other articles, sold and delivered by them to me at various times within the last two years, as per schedule annexed ;" no schedule being in fact annexed.

The *amount* of the debt, for which judgment is confessed—and if it be for money lent and advanced, the amount of money loaned, and if it is for goods sold and delivered, the amount of the sales, or total price of the goods—must be set forth explicitly, and not be left to inference.

This is a vital part of a valid confession ; and the omission of it is a fatal defect.

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**A** PPEALS from orders setting aside judgments entered on confession. The Middletown Bank having, on the 16th October, 1857, recovered a judgment against Daniel Gerow and others for \$1525.37, moved to set aside the judgments in the above three causes, on the ground that the statements made upon confessions of the judgments were defective. The motions were heard by Justice BROWN, in April, 1859, and he made orders setting aside each of the judgments, with costs. From these orders each of the plaintiffs above named appealed. In the case of Clements, the statement made on confession was as follows :

“ I do hereby confess judgment in this cause in favor of William Clements, plaintiff, for the sum of one thousand two hundred and twenty-eight dollars and fifty cents, and authorize judgment to be entered therefor against me.

This confession of judgment is for a debt justly due to the plaintiff, arising upon the following facts: *For money lent by said plaintiff to me on the 1st day of April, 1856, and interest on the same from the 1st day of April, 1857.*

DANIEL GEROW.”

In the case of Ryder, the statement on confession is as follows :

“ I do hereby confess judgment in this cause in favor of Jacob Ryder of Westchester county, the plaintiff, for the sum of three hundred and twenty-one dollars, and authorize judgment to be entered therefor against me.

This confession of judgment is for a debt justly owing from me and due to the plaintiff, arising from the following facts: *For money borrowed by him of me in June, 1855, for which I gave him my note, and one year's interest thereon.*

DANIEL GEROW.”

In the case of Carpenter and others, the statement on confession is as follows :

“ I do hereby confess judgment in this cause in favor of the plaintiffs, for one hundred and ninety dollars, and authorize judgment to be entered therefor against me.

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*This confession of judgment is for a debt justly due and owing from me to the plaintiffs, for goods, wares and merchandise, groceries, dry goods, salt, calico, muslin, molasses, sugar, and other articles, sold and delivered by them to me at various times within the last two years, as per schedule annexed.*

DANIEL GEROW."

No schedule was in fact annexed to the confession.

Gerow, the defendant, was the owner of a farm in the county of Sullivan, upon which these judgments were liens prior to the lien of the judgment of the Middletown Bank.

*John H. Reynolds*, for the appellants.

*John W. Wilkin*, for the respondents.

*By the Court*, HOGEBROOM, J. A judgment by confession, without action, may be entered in two cases: 1. For money due or to become due. 2. To secure against a contingent liability. (Code, § 382.) To accomplish this, a statement in writing must be made, and verified by the defendant, stating, 1. The amount for which judgment may be entered, and conferring authority to do so. 2. Concisely the facts out of which the debt or liability arose. 3. Showing that the sum confessed does not exceed such debt or liability. (§ 383.) This, although not the precise language, is the substance of the provisions of the code, and is all which the law requires. Nothing else is necessary to be incorporated in the statement, and these requisites must be substantially complied with. When, therefore, the code declares that the facts constituting the debt or liability shall be *concisely stated*, it cannot be necessary that there should be a full or copious statement, or one embracing much detail. The form or particular ingredients of this statement are not prescribed, and they must therefore be regulated by the reason of the thing, and the object and intent of the statute. These are, I suppose, mainly if not exclusively to prevent fraud; and to accomplish this, the

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statement should *identify* or individualize the claim, so that another claim could not be substituted for it when it came to be inquired into ; and should also show a claim apparently valid, with such particulars of its nature and consideration as would aid a conviction for perjury if the statement were false, and as would enable other persons interested in the matter to ascertain the facts. When these objects are reasonably answered by the statement, I think every thing is done which the statute requires, and it is improper to require more. It is true, the statute is not specific as to all the ingredients of this statement, but it is clear that it may be *concise*, and we must give effect to this language. It was evidently not designed to embrace much detail or formality ; and I am opposed to giving an interpretation to this statute which shall carry it beyond its fair and obvious meaning. If there be ambiguity in the statute itself, let it be corrected by the legislature, and in the mean time let statements apparently within the scope of its provisions be protected. I am of opinion that several adjudicated cases have gone too far, and exacted an unnecessary strictness of detail. I do not believe, as was held in the case of *Lawless v. Hackett*, (16 *John*. 149,) under the statute of 1818, that the statement "ought to be as special and precise as a bill of particulars." This would not state *concisely* the facts ; and although it may be true, as a general rule, that "a statement as general as the common law counts in a declaration is not sufficient," it is not universally so. For example, if the transaction upon which judgment was confessed consisted of a single loan of money, I do not see how the indebtedness could be more truly and appropriately stated, than to say it was "for \$100 loaned by the plaintiff to the defendant on the 1st day of January, 1859." And while I should have concurred in the conclusions at which the court of appeals arrived, as respects the validity of the judgments controverted in the cases of *Chappel v. Chappel*, (2 *Kern*. 215,) and *Dunham v. Waterman*, (17 *N. Y. Rep.* 9,) I think the course of reasoning in both of those cases tends to

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exact a degree of particularity and detail which the code has not required. The present statute differs, in language, from the statute of 1818. The one required "a *particular* statement and *specification* of the nature and consideration of the debt;" the other, a *concise* statement of "the facts out of which the debt arose." And although the general object of both statutes was similar, I think the marked difference in the phraseology must have been intentional, rather than accidental or merely verbal. It is undoubtedly difficult to lay down any universal rule by which to test the validity of judgments, under the statute in question; particularly as much latitude is allowed, under the code, in the statement of facts, even in a pleading, and we should be careful not to give so loose an interpretation to this statute as to deprive it of all real efficacy. I shall not, therefore, make the attempt. The better way is to dispose of each case as it arises, on its intrinsic merits.

To examine the judgments in question. I regard them all as defective in one important and fatal particular. They do not show that the sum for which judgment is confessed "is justly due or to become due." In other words, as expressed in the next subdivision of the same section—which I think means the same thing—they do not show that the "sum confessed does not exceed" the (debt or) liability. (*Code*, § 383.) The obvious object of this was to require such a specification as should show that the judgment was not magnified beyond the true amount of the debt or liability. In the case of *Clements v. Gerow*, it is first stated that judgment is confessed for \$1228.50. It then adds, "This confession of judgment is for a *debt* (without stating to *what amount*) justly due to the plaintiff arising upon the following facts: For *money* (without stating how much) lent and advanced by said plaintiff to me on the first day of April, 1856, and interest on the same from the first day of April, 1857."

In the case of *Ryder v. Gerow*; after making confession of judgment for \$321, the statement proceeds—"This confes-

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sion of judgment is for a *debt* justly owing from me and due to the plaintiff, arising from the following facts : For *money* borrowed by me of him in June, 1855, for which I gave him my note, and one year's interest thereon."

The same difficulty presents itself in the case of *Carpenter and others v. Gerow*.

None of these statements, it will be seen, specify the *amount* of the *debt* for which judgment is confessed ; nor the *amount* of money loaned, in the first two cases ; nor the *amount* of the sales, or total *price* of the goods, wares and merchandise sold and delivered in the last case. Nor, do I think, is the amount to be *reasonably inferred* (if that were sufficient) from the language employed. Were the actual indebtedness in each case \$100 or \$1, instead of the amount for which judgment is confessed, I do not see but that the statement would be true, or that the defendant could be convicted of perjury. This I regard as a *vital* part of a valid confession, and the omission of it, in these cases, a *fatal defect*. It is not to be left to inference. The statute expressly requires, in substance, that the statement shall *show* that the sum confessed does not exceed the amount of the debt.

It is not essential, therefore, to examine the statements in the other particulars to which exception is taken. It is perhaps, however, not improper to remark, in illustration of some of the positions herein assumed, that in other respects, at least as to the Clements and Ryder judgments, I regard the statements as conforming to the statute, and as sufficiently stating the facts out of which the debts arose.

The orders appealed from must, in each case, be affirmed, with \$10 costs.

[ALBANY GENERAL TERM, September 5, 1859. Wright, Gould and Hogeboom, Justices.]

GARRETT VAN DERZEE<sup>2</sup> vs. JOHN B. VAN DERZEE.

Notwithstanding the introductory words of a will evince an intent to dispose of all the testator's worldly estate, this is not sufficient to enlarge the estate subsequently divided, into a fee, unless the words of disposition, in the *clause of devise*, are connected, in terms or sense, with the introductory clause, and import more than a mere description of the property. Reddick,  
Shaw  
574 H. S.

Where a testator, by his will, executed before the revised statutes took effect, devised a farm to his son Storm, without words of inheritance or perpetuity, *held* that the devisee, under this clause of the will, took only a life estate.

*Held also*, that the following clause in the same will, "Further, I make my wife master of one third of my aforesaid estate as long as she remains my widow, and after her marriage or death to be and belong to my aforesaid son Storm," did not have the effect to enlarge the life estate previously given to Storm, into a fee.

Where a portion of a farm devised had been held, possessed and claimed by the testator since 1769, and the residue since 1790, and was so held and claimed by his successors, after his death, as under a lease in fee from one V. R., and rent had always been paid for the entire portion in that character, and such a title had been uniformly recognized by V. R., the landlord, *Held*, that the interest of the tenant or lessee in fee, as such, had been held and claimed adversely, which made a perfect title by adverse possession; and that the title and claim and possession of the tenant and his heirs thus derived and held, having been uniform, unbroken and perfect for so long a period down to the present time, the landlord could never dispossess them so long as they complied with the terms of the lease, or the conditions of the tenancy.

Accordingly *held*, that the testator had an interest in the farm, which could pass by the terms of his will.

**T**HIS was an action of ejectment, for the recovery of one-seventh of 263 acres of land in the town of Bethlehem, Albany county. Each party claimed under Cornelius Van Derzee, jun., the father of the plaintiff, and the grandfather of the defendant; the plaintiff claiming as heir at law, and the defendant under a devise to Storm Van Derzee. Cornelius Van Derzee, jun., died in 1800, in possession of the premises, and claiming to own them. His will was made and proved the year of his death. The premises in question were devised to the defendant's father, Storm Van Derzee, either *for life*, as the plaintiff insisted, or *in fee*, as claimed by the

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defendant. Storm Van Derzee died on the 30th of November, 1853, and the plaintiff's title then accrued, unless the devise carried the fee. The will in question was as follows:

"As for that worldly estate wherewith it has pleased God to bless me, I dispose of it as follows:

First. I give unto my loving Wife Annanty my Negro man Prince and my red Mair to her & her heirs, further I Give unto my three Dauters Elizibeth Rauchel & Anney & to thair heirs Each Two Milk Cows.

Further I give unto my five Daughters, Easter Elizibeth Affe Raichel & Anney & to thair heirs Each Twenty Dollers, I bequeth & Give unto my son Walter & John Van Der Zee & to thare heirs Each Two hundred Dollers.

I further give unto my son Storm Vanderzee One hundred & Twinty Acres of land which is the farm I now live on & also the new possession joining to my farm lately run out by Jacob Winne. I also give unto my son Garret Van Derzee One Dollar, I further give to my son Storm Van Derzee all my farmen Utensiils, I also give all my household furniture to my loving wife Annauty as long as she remains my widdow. After he marriage or Deth I make it to my five Dauters Easter Elizibeth Affe Raichel & Anne to be equilley divided between them. I further give unto my son Walter & John Van Der Zee & to my five Dauters Easter Elizibeth Affe Raichel and anne all the remainder of my Horses & Cows to be equilley divided between them. Further I make my Wife Master of one third Of my aforesaid Astate as long as she remains my Widdow & after her Mariage or Deth to be & belong to my aforesaid son Storm Van Der Zee the above remainder of my Horses and Cows to be the property of my wife Annautey Vanderzee as long as she remains my Widdow after her Marriage or deth to my aforesaid two sons & five Dauters and to there heirs for ever. further the Cows & horses must not be sold or embeseled by my wife, but be & remain for my aforesaid Two sons and five Dauters."

The plaintiff demanded possession of his share, which

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the defendant refused, claiming title to the whole, and this action was accordingly brought. The cause was tried at the Albany circuit on the 12th of December, 1855, before Justice HARRIS and a jury. The defendant moved for a nonsuit, on the grounds: 1. That Storm Van Derzee was entitled to the fee under the will. 2. That Cornelius Van Derzee, jun., the testator, had no interest in the land capable of being inherited. The motion was denied. No question being raised to be submitted to the jury, Judge Harris directed a verdict for the plaintiff for one-seventh of the premises, subject to the opinion of the court at general term. The jury assessed the plaintiff's damages at \$121.75. The testator left a widow, four sons and five daughters. The widow died in 1825. Two of the children died without issue. At the time of the trial the plaintiff was the only surviving son, and the other heirs were Anne, the only surviving daughter, and the respective children of Storm and John Van Derzee, and of the three deceased married daughters. Thus the plaintiff was entitled, as heir at law, to one-seventh of the property, and of the damages for withholding possession. The farm of the testator originally embraced about 293 acres. One lot of 10 and another of 20 acres were sold to John Soop. The residue of the premises embraced about 263 acres. Of the 293 acres, 121 were held under a lease in fee from Stephen Van Rensselaer. By the clerical omission of one of the courses in the original lease the lines did not close; but among the ancient muniments of the title attached to the original lease in the office of General Van Rensselaer, was found the evidence of the discovery and correction of the error in 1771, in accordance with the original map and field book, and with the lines indicated by marked trees at the time of the survey and execution of the lease. The Van Rensselaer maps of 1771, 1790 and 1845, accord with the corrected description. The testator, his son, and the defendant, have always claimed and held in accordance therewith. The remaining 172 acres was the portion of the testator's farm, de-

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scribed in his will as "the new possession." No written lease or paper title for this portion of the farm has been discovered. It was embraced, however, in the map and survey of the testator's land, made by Winne for Stephen Van Rensselaer, in 1790. It was held and claimed by the testator in his lifetime. It was devised as his, in his last will. The rents were paid to Van Rensselaer as upon a lease in fee, by the testator, the life devisee, and the defendant. It was claimed by the defendant and his father, *under the will* of Cornelius Van Derzee, jun. No question was made upon the trial in regard to this portion of the land, as distinguished from the rest of the farm. Storm Van Derzee made no specific devise of the farm in question, but by virtue of a general gift of all his "real and personal property," the defendant claimed through his father's and under his grandfather's will.

*John K. Porter*, for the plaintiff.

*John H. Reynolds*, for the defendant.

*By the Court*, HOGEBOM, J. Looking at the will in question, irrespective of legal rules, I have very little doubt that the testator intended to give Storm Van Derzee a fee in the premises in controversy. But applying the test that the intent of the testator must be sufficiently expressed on the face of the instrument, and must be consistent with the rules of law, I am constrained to come to a different conclusion.

The introductory words doubtless evince an intent to dispose of all the testator's worldly estate, but this is not sufficient to enlarge the estate subsequently devised into a fee, unless the words of disposition in the *clause of devise* are connected, in terms or sense, with the introductory clause, and import more than a mere description of the property. (*Barheydt v. Barheydt*, 20 *Wend.* 576. *Doe v. Buckner*, 6 *T. R.* 610. *Denn v. Goshen*, *Cowp.* 657. *Doe v. Wright*, 8 *T. R.* 64. *Loveacres v. Blight*, *Cowp.* 352. *Olmsted v. Harvey*, 1 *Barb.* 109; *S. C.*, 1 *Comst.* 483. *Jackson v. Harris*, 8 *John.* 141.)

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The clause of the will which devises the property in question to Storm Van Derzee contains no words of inheritance or perpetuity, and upon well established principles applicable to cases arising, as this did, before our revised statutes took effect, in 1830, confers upon the devisee only a life estate. (*Wheaton v. Andress*, 23 *Wend.* 452. *Van Alstyne v. Spraker*, 13 *id.* 578. *Burlingham v. Belding*, 21 *id.* 463. *Jackson v. Wells*, 9 *John.* 222. *Jackson v. Embler*, 14 *id.* 198. *Ferris v. Smith*, 17 *id.* 221. *Olmstead v. Olmstead*, 4 *Comst.* 56. *Mesick v. New*, 3 *Seld.* 163.)

The only other clause of the will which can be relied on, to enlarge the life estate into a fee, is the following: "Further, I make my wife master of one third of my aforesaid estate as long as she remains my widow, and after her marriage or death to be and belong to my aforesaid son Storm Van Derzee." I think this does not have that effect, for the following among other reasons: 1. The words "aforesaid estate" seem to refer to the estate or land before given to Storm Van Derzee in the clause previously mentioned. They naturally refer to an estate before given to Storm. They apparently refer to *real* estate, and are probably a provision in substance like that for a widow's dower. They could not well refer to an estate *in fee*, for they are restricted to an estate during *life* or *widowhood*. They do not seem to refer to the testator's whole "worldly estate;" for a devise to the widow, of one third of the whole real and personal estate, would directly conflict with several previous devises to other persons, and would also, in some measure, conflict or fail to harmonize with a devise of horses and cows to the widow for the same term, immediately following the devise in question. 2. The words "aforesaid estate" seem to be words of description or of reference, and not designed to mark the quantity or quality of the estate devised. In such case they are not held necessarily to embrace the testator's entire interest in the property, but to take the form and character of the estate to which reference is made. (*Frogmorton v. Wright*, 3 *Wils.* 418. *Doe v. Ravell*, 2 *Cr.*

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& *Jervis*, 621. *Doe v. White*, 1 *Exchequer Rep.* [*Welsby, Hurlstone & Gordon*,] 525, 535. *Morrison v. Sempler, Binney*, 97. *Spraker v. Van Alstyne*, 13 *Wend.* 578.) 3. There is nothing, therefore, in the words "aforesaid estate," necessarily or fairly importing an intent by the testator to employ them as descriptive of the quantity of his interest; and this conclusion is strengthened by the fact that he has used words of inheritance in other parts of the will, in reference to other property. 4. If these words were construed as being descriptive of the quantity of interest, instead of terms of reference or identification of property, they would only enlarge into a fee the previous life estate as to the *one third* devised to the widow during her life or widowhood; for the words fairly limit the remainder to that one third. Such could scarcely have been the testator's intention. 5. The estate of Storm is not enlarged into a fee simply by being a remainder limited upon a previous life estate. Successive life estates were not uncommonly limited upon the same property in *express words*; and therefore there should be no implication against them as improbable. Besides, it has been held in repeated instances, that where successive estates were thus created by will without words of inheritance, they must (the latter estate as well as the first estate) be construed as simply estates *for life*. (*Hay v. Earl of Coventry*, 2 *T. R.* 83. *Compton v. Compton*, 9 *East*, 267. *Doe v. Clark*, 5 *Bos. & Pull.* 343. *Doe v. Wright*, 8 *T. R.* 64. *Ferris v. Smith*, 17 *John.* 221. 2 *Powell on Devises*, 377. *Edwards v. Bishop*, 4 *Comst.* 61. *Harding v. Roberts*, 23 *Eng. Law and Eq. Rep.* 452.)

Although, therefore, if we allowed ourselves to indulge in conjectures, we might very plausibly infer a probability that the testator, by the will in question, designed to pass a fee to Storm Van Derzee; especially as the will contains no residuary clause; we are nevertheless bound, I think, by the rules of law, to interpret the will as only conferring upon him a life estate.

I discover no reasonable foundation for the remaining posi-

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tion assumed by the defendant's counsel, that the testator had no interest in these lands which could pass by the terms of this will. A portion of the property has been held, possessed and claimed by the testator and his successors since 1769, and the residue since 1790 as under a lease in fee. Rent has always been paid for the entire portion in that character. Such a title has been uniformly recognized by the landlord. It has been held adversely to the landlord; that is, the interest of the tenant or lessee in fee as such, has been so claimed and held, and that makes as perfect a title by adverse possession as if the Van Derzees had claimed the whole title and the entire interest. It has been held as a lease or rent farm, and from the moment that the lease was made, or rent paid and received, the title of the tenant to the farm, *as tenant*, to the extent of the qualified ownership resulting from the relation of landlord and tenant, was as perfect and as adverse to the landlord's title or claim to the tenant's interest, as is the title of the grantee in a deed perfect against and hostile to the title of the grantor, from the moment the deed is executed. (*Bradstreet v. Clarke*, 12 *Wend.* 602. *Osterhout v. Shoemaker*, 3 *Hill*, 513. *Averill v. Wilson*, 4 *Barb.* 180.) The title and claim and possession of the Van Derzees, thus derived and held, has been uniform, unbroken and perfect from the early periods above named to the present time. The landlord can never dispossess them so long as they comply with the terms of the lease or the conditions of the tenancy. I cannot see any pretense for saying that here there was no inheritable interest. There is nothing in *Bigelow v. Finch* (17 *Barb.* 394) which conflicts with this view. The disposition made of the case at the circuit was therefore right, and there must be judgment for the plaintiff upon the verdict.

[ALBANY GENERAL TERM, September 5, 1859. *Wright, Gould and Hogeboom*, Justices.]

FORWARD *vs.* HARRIS.

The plaintiff, and S., his assignor, being in possession of a bill of exchange, valid in their hands, for \$913.50, drawn by one T., their debtor, to the order of, and indorsed by, two other persons, on the defendant, payable in three months, delivered the same to the defendant on his promise to pay them therefor the sum of \$850, the next morning. *Held* that there was a good consideration to uphold the promise; the parting with the bill, under the circumstances, being a detriment to the holders, whether it was then accepted or not, and the receipt of it by the defendant being a legal benefit and advantage to him.

Where a defendant makes himself a witness, in his own behalf, under the 399th section of the code, his credibility is not certified by the plaintiff, but is to be weighed in the same manner, and his testimony submitted to the same tests, as that of other witnesses. And if his testimony and that of the plaintiff (or his assignor) are conflicting, the one testifying to one state of facts, and the other contradicting him—it is the duty of the referee, in deciding upon the facts, to pass upon the comparative credit of the two witnesses. And the judgment will not be reversed—in the absence of any controlling or influential circumstances in favor of one or the other—because he has given credit to one, rather than to the other.

THIS action was brought upon a contract alleged to have been made by the defendant with Forward & Smith, in Canada, under the following circumstances: Forward & Smith, residing and doing business in Oswego, in November, 1853, had a claim against one Thompson; residing in Canada, which was in the hands of the defendant as their agent, to look after. In November, 1853, Smith, of the firm of Forward & Smith, being in Canada, set about securing his debt against Thompson, who procured the blank indorsement of two other individuals upon paper on which a bill or note could be drawn, for the purpose of securing the debt of Forward & Smith. Upon this paper a bill was drawn by Thompson on the defendant, payable at a future day, to the order of the two indorsers, in blank, the defendant being present. The bill was a little over \$900, and after it was drawn and, as the plaintiff claims, accepted by the defendant, it was agreed that the defendant should pay to Smith for his firm, the next morning, \$850 for the bill, and it was delivered to him. The

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next morning the defendant told Smith he had not been able to procure the note to be discounted, and could not pay the money then, but that Smith might telegraph to his partner at Oswego to draw on him at ten days, and he would accept and pay. He did so, and the partner drew at ten days' date, and the draft was dishonored for non-acceptance. The draft delivered to the defendant was never returned to Forward & Smith, but another of like amount, but of a different date, with no drawee named in it, was sent to them by the defendant. Smith assigned the claim against the defendant to his partner Forward, who brings this action. The facts were in dispute between the parties, and this statement is substantially in accordance with the claim of the plaintiff and the finding of the referee. The cause was tried by a referee, who gave judgment for the plaintiff for the \$850 and interest from the time of the contract; and the defendant appealed.

*C. Rhodes*, for the appellant.

*Robinson & Getty*, for the respondent.

*By the Court*, W. F. ALLEN, J. I am inclined to believe that the plaintiff in his complaint, and the referee in his report, have fallen into an error in calling the transaction between Smith, acting in behalf of Forward & Smith, and the defendant, a sale and transfer of the draft or bill of exchange from the firm to the defendant. The bill being drawn on the defendant, whether accepted by him or not, was perhaps the subject of a sale to him; although this may not be entirely clear. But the mistake, if one was made, is unimportant, and does not affect the rights of the parties. The facts upon which the plaintiff predicates his right to recover are substantially stated in the complaint, and reported by the referee to have been proved upon the trial. The judgment is consistent with the case made by the complaint, and no objection can be taken, for the reason that the transaction has been called a

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sale, instead of being counted upon as a special agreement, on the part of the defendant, to pay the firm of Forward & Smith a specified sum for considerations which are sufficiently stated, moving between the parties to the agreement. (*Code*, §§ 275, 169.)

Assuming that the plaintiff's allegations were true, and that the report of the referee is supported by the evidence, the plaintiff and his partner were in possession of a bill, valid in their hands, drawn by their debtor, to the order of, and indorsed by, two other persons, on the defendant. If it was accepted, then it constituted also a valid claim against the defendant, as acceptor, absolutely liable to pay it. If it was not accepted, the holders might at once have prosecuted it for acceptance, and either secured the liability of the defendant, or, if acceptance was refused, had their action, immediately, against the drawer and indorsers. This valuable paper, and their legal rights, they parted with to the defendant upon his promise to pay a given amount. The parting with that paper, under the circumstances, was a detriment to the holders. It was an injury to them, and therefore sufficient to sustain the promise. But the receipt of the bill was a legal benefit and advantage to the defendant. The payment by him was not a voluntary payment of the debt of a third person, without request, which could not give an action against the party benefited by the payment. The draft was a written request by the drawer to pay the amount specified in the bill, and if the defendant, the drawee, had funds of the drawer in his hands, the payment discharged him to the amount paid; and if he had not funds, then it gave him a legal claim upon the drawer for the amount of the bill, and the possession of the bill would be evidence of payment. (*Wing v. Terry*, 5 Hill, 160.) In this aspect there was a good consideration moving to this defendant, to support the promise. The bill was for \$913.50, payable three months from the time of the alleged agreement, which was to pay \$850 presently. The difference in the times of the payment, and between the amount paid

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and the amount thereafter to become due, formed the inducement to the parties to enter into the agreement ; the one receiving an equivalent in ready pay, the other in the enhanced amount to be received at a future day. It was not the case of an agreement to pay a small sum in satisfaction of a larger debt actually due, nor a simple contract to pay a debt secured by a higher obligation, and is distinguished from the several cases cited by the counsel for the appellant. (*Miller v. Holbrook*, 1 *Wend.* 317. *Seymour v. Minturn*, 17 *John.* 170. *Pabodie v. King*, 12 *id.* 426. *Miller v. Watson*, 5 *Cowen*, 195.) This view of the contract renders it unnecessary to inquire what effect a sale of the bill to the drawee would have, upon its validity as a bill. In no event would the indorsers be liable to the drawer, and his claim upon the drawer would be for money paid at his request. This brings me to the question whether the report and judgment of the referee was warranted by the evidence. The evidence bearing upon the principal features of the transaction was conflicting, the assignor of the plaintiff testifying to one state of facts, and the defendant, testifying in his own behalf, contradicting him. It is claimed by the counsel for the appellant that this left the plaintiff's case unproved, in analogy to the rule in chancery that an answer of a defendant, under oath, responsive to the bill, could not be overcome by a single witness. But that was for the reason that the complainant, by calling for a discovery from the defendant, made him, for that purpose, his witness, and was estopped from discrediting him, and therefore a single witness against the answer left the case balanced, and other evidence was required to give a preponderance in favor of the complainant. And perhaps where a party calls his adversary as a witness, under the 390th section of the code, the rule might be applied. But the defendant in this action made himself a witness, under the 399th section, in his own behalf, and his credibility was not certified by the plaintiff, but was to be weighed, and his testimony submitted to the same tests as that of other witnesses, and it was the duty of

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the referee to decide upon the facts ; and in so doing, he necessarily passed upon the amount of credit to be given to the two witnesses upon whose testimony the case turned. He had the means of determining the comparative credit of the two, which we have not, and the judgment cannot be reversed, in the absence of any controlling or influential circumstances in favor of one or the other, because he has given credit to one rather than to the other. If this is so, then the evidence of Mr. Smith was to the point, and authorized the report of the referee. His testimony is positive to the agreement, and to the delivery of the bill to the defendant for his use, and the acceptance of it by the latter and the subsequent promise to pay ; and the testimony is confirmed by the omission of the defendant to return the bill to Forward & Smith after he repudiated the agreement, and his attempt to substitute another and imperfect bill in its place. Whether the bill was accepted by the defendant or delivered to him under the agreement, was a question of fact properly decided by the referee, upon the circumstances in evidence. It is true the witness Smith testified that he could not say that the defendant, when he took the paper, did not understand that he would take it and get it discounted ; and as this related to the mental operations of the defendant, he could not properly speak of them. But he tells what passed, and the referee judges of the intent of the parties and what was really understood, and upon what their minds actually met. The referee evidently gave credit to Smith, and upon his testimony there is no doubt of the performance of the agreement on the part of the plaintiff and his copartner, by the delivery of the bill to the defendant and the acceptance of the same by him as a performance on the part of Forward & Smith.

That the contract was void by the statute of frauds cannot be objected, for the reason that there is no evidence that there is such a statute in Canada, or if so, what are its provisions. The variance, if any exists, between the pleadings and proofs, in respect to the dates, amounts and times of payment of the

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drafts mentioned, was not objected upon the trial. The objection was waived, by the omission to take it then, and it cannot be taken now, upon appeal. And so the objection that the draft drawn by Forward & Smith on the defendant was at ten days' date, instead of ten days' sight, cannot now be taken, for several reasons: (1.) It was not taken on the trial. (2.) The refusal to accept and pay it was not put upon the ground that it was not drawn in pursuance of the agreement and understanding of the parties. If that objection had been taken, a new bill would have been drawn to obviate the objection. The objection to accept and pay, was upon the ground of a repudiation, or rather a refusal to recognize the contract or any subsisting liability on his part, and it is now too late to rest an objection upon ground which might have been obviated if it had been taken at a proper time. (3.) The action was upon the agreement to pay the next morning after the delivery of the draft to the defendant. The consent of Forward & Smith to draw the bill was not a new agreement, or a modification of the old agreement, but the mere adopting of a mode of payment at the request and for the benefit of the defendant; and had he accepted and paid the draft, it would have discharged the original understanding, but not having done so, that remained in force.

There was no error in the rulings of the referee in the admission or exclusion of evidence. The parol evidence of the contents and acceptance of the draft of Thompson on the defendant, the subject matter of the agreement, was properly admitted. It was, if in existence, in the possession of the defendant, and the nature of the action was sufficient notice to him to produce it on the trial, if its production was necessary. The objection to evidence of acceptance, that it was not averred in the complaint, was not taken, and was therefore waived. The bill drawn by Forward & Smith on the defendant was properly admitted in evidence as a part of the *res gestæ*, and the solvency of Thompson and the prior negotiations between Thompson and the defendant for the securing of Forward &

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Smith's debt against Thompson were irrelevant, as the evidence would have thrown no light upon the transaction under investigation, and also for the reason that it was to matters quite collateral to the matters testified to by Smith, and not calculated to qualify or explain his evidence, or discharge any claim or demand established by it. The principle of the case of *Gardner v. Clark* (17 Barb. 538) is probably correct as there stated, but the testimony offered to be given by the defendant in this case did not come within it.

The judgment must be affirmed.

[OSWEGO GENERAL TERM, July 7, 1857. *Hubbard, Pratt, Bacon and W. F. Allen, Justices.*]

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STEWART vs. WALLIS.

A new assignment, in an action for a trespass, setting forth more particularly the cause of action relied upon, is not necessary, nor allowable, under the code.

An order laying out a highway, signed by only two commissioners of highways, and not containing any statement showing that the third commissioner met and deliberated with them upon the subject matter of the order; or that he was duly notified of the meeting, and failed to attend, is void.

If an order is defective in omitting to state those facts, the defect cannot be cured by parol evidence, showing that the third commissioner was duly notified, and failed to attend.

The form by which private property may be taken, for the purpose of laying out a public highway, having been prescribed by statute, that form must be strictly pursued, or the attempt will be ineffectual and the proceedings void; and all persons, acting under color of them, will be trespassers.

**A**CTION for trespass on land. The defendant justified as a commissioner of highways, alleging the entry complained of to have been in the performance of his official duties in the opening and working a highway properly laid out, and that the *locus in quo* was a public highway. The order laying out the highway was signed by only two commissioners,

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and the orders and proceedings did not show that the third commissioner attended and took part in the deliberations, or that he was notified and failed to attend. The defendant offered to show that the third commissioner was duly notified and failed to attend, and the exclusion of the evidence thus offered forms the ground of one of the defendant's exceptions. The court held the order and proceedings of the commissioners invalid. The complaint was general, alleging the trespass to have been by entry, &c. into the close of the plaintiff, situated, &c., without giving the metes and bounds. Upon the trial, the defendant having proved the existence of certain highways within the limits of the general description of the *locus in quo*, insisted that the trespass was fully justified, and that the plaintiff, if he had desired to limit the justification to a particular close, should have newly assigned. The court held that the plaintiff was not bound to new assign, and the defendant excepted.

The action was tried in the Onondaga county court, and a verdict and judgment rendered for the plaintiff, and the defendant appealed to this court.

*B. Davis Noxon*, for the appellant.

*B. H. Gardner*, for the respondent.

*By the Court*, W. F. ALLEN, J. Had the pleadings in this action been subject to the rules of the common law, the position of the defendant, regarding his justification, would have been correct, and the plaintiff not having new assigned the trespass, and particularly pointed out and described the *locus in quo*, the defendant would have been entitled to a verdict. (1 *Chit. Pl.* 663.) The code, however, has established an entirely different system of pleadings, and a new assignment would be wholly out of place under it. In courts of justice of the peace, the only pleadings are a complaint and answer, and a demurrer. (*Code*, § 64, *sub.* 1, 6.) And upon the dis-

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continuance of an action commenced before a justice of the peace, upon the interposition of an answer showing that title to real property will come in question, and the bringing of a new action as a continuation of the same prosecution, the complaint and answer must be substantially the same as before the justice. (Code, § 60. *Wendell v. Mitchell*, 5 How. 424.) A new assignment is simply a replication, setting forth more particularly the cause of action relied upon, and, under the code, would not have been allowable; as a reply in a justice's court is now unknown. Under the former practice, the new assignment was required to be put in before the justice, and could not be put in in the court above, in which the new action should be commenced. (*Ellicott v. Beyer*, 8 Wend. 503. *Tuthill v. Clark*, 11 id. 642.) In courts of record no reply is given, except in answer to a counter-claim alleged by the defendant; and the code expressly declares, that all pre-existing forms of pleadings are abolished, and that the forms of pleadings shall be those prescribed by that act. (Code, §§ 140, 153.) Had the plaintiff undertaken to reply to the answer in this case, by way of new assigning the trespass, it would have been stricken out, upon notice. If the complaint was really so general that the defendant did not know what close was intended, or what trespass was complained of, the remedy is given by the 160th section, which authorizes the court to require the pleadings to be made definite and certain by amendment. The necessity for a new assignment, in any case, was never so much for the purpose of giving information to the defendant, and enabling him to meet the charge and prevent his being misled, as to conform to the technical rules, and pleadings and practice of the court. It was unknown in equity and in admiralty, and is superseded in the courts of common law of this state, by the code.

The next question is, as to the sufficiency of the order laying out the highway on the *locus in quo*, signed by only two commissioners of highways, and not containing any statement showing that the third met and deliberated with them upon

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the subject matter of the order, or was duly notified of the meeting and failed to attend. It is undoubtedly true that at common law, in matters of public concern, when authority is confided to several, a majority may act in the premises, provided all meet and consult together, and have a voice in the matter; and it will be presumed, in the absence of evidence to the contrary, that all met and deliberated. (*Green v. Miller*, 6 John. 39. *Ex parte Rogers*, 7 Cowen, 526. *Downing v. Rugar*, 21 Wend. 178. *Spicer v. Slade*, 9 John. 359.) The power of a majority to bind the minority and act for the whole, upon a meeting of all, is made a part of the statutory regulations of the state in cases of the delegation of power and authority to several. (2 R. S. 555, § 27.) But this provision does not embrace cases for which special provision is made. For the acts of commissioners of highways special provision is made by law. In 1826 provision was made authorizing a majority to act, when all had notice of the meeting and its object, provided the fact of the notification was made to appear. (*Laws of 1826*, p. 230, § 9.) And by the revised statutes, (1 R. S. 528, § 125,) any two commissioners of highways may make any order in the execution of the powers conferred upon them, provided it shall appear in the order filed by them that all met and deliberated on the subject embraced in such order, or were duly notified to attend a meeting of the commissioners for the purpose of deliberating thereon. The circumstances under which they may act in the absence of a third commissioner, and the condition upon which the order of two commissioners, made in the absence of a third, is to be valid, is prescribed by the statute, and the form of the order to be made in such case is given, to the end that the public records shall always contain prima facie evidence of the regularity and validity of the proceedings. The legislature made special provision for this case, and thereby took it out of the common law rule applicable to similar cases, as that rule was embodied in the revised statutes. They did this by allowing two to act in certain cases, although all of the commissioners should not

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meet, which was not allowed at common law, or by the general statute, and by prescribing the form of the order in every case in which all the commissioners should not concur. They have prescribed the case in which, and the condition upon which, the order shall be valid, and of course have excluded every other case, and said that in no other case shall the order be valid. (*Broome's Legal Max. 27 et seq. Smith on Statutes, 654, 5.*) The form by which private property may be taken for public purposes having been prescribed, it must be strictly pursued, or the attempt will be ineffectual and the proceedings void, and all persons acting under the color of them will be trespassers. *Fitch v. Com's of Kirkland*, (22 *Wend.* 132,) and *Tucker v. Rankin*, (15 *Barb.* 471,) are in conflict upon the precise point now considered. The reasons for the judgment in the former case are more satisfactory to me than those of the able judge pronouncing the opinion of the court in the latter case; and therefore I prefer to follow the first decision. The county court was therefore right, and the judgment must be affirmed. If the order was defective, its defects could not be cured by parol, and the evidence offered by the defendant supplementary to the order, was properly excluded.

Judgment affirmed.

[ONONDAGA GENERAL TERM, JANUARY 5, 1858. *Pratt, Bacon and W. F. Allen, Justices.*]

KINNEY *vs.* THE CITY OF SYRACUSE.

The 9th section of the act of the legislature, of April 17, 1858, "to amend the act to revise the charter of the city of Syracuse," by which a portion of the city of Syracuse, on the easterly line of the city and adjoining the town of Dewitt, was taken from the city and annexed to the town of Dewitt, and two assembly districts were thereby altered, without any provision being made in respect to the political *status* of the inhabitants of the excised and annexed territory, or defining their rights in reference to the assembly districts, or the manner in which they should participate in the election of representatives from the several districts, was a violation of the provision of the constitution, contained in the fifth section of the third article, that the assembly districts, when once fixed and determined by the board of supervisors, shall *remain unaltered*, until the next decennial enumeration; and is therefore void. W. F. ALLEN, J., dissented.

The *incidental* alteration of the boundaries of an assembly district, resulting from an act of the legislature changing such boundaries, is an alteration of a district, within the prohibition of the constitution.

The provision in the constitution, which secures assembly districts, when once fixed and determined, from alteration, was intended to be, and is, not merely a prohibition upon the *board of supervisors*, but also a restriction upon the *legislative power* to alter and change the boundaries of towns.

THIS is a case agreed upon by the parties, for the purpose of determining the validity of a levy made under a warrant issued under the authority of the city of Syracuse, and of the assessment upon which the same was issued, and the liability of the plaintiff to pay any sum for taxes assessed under or by the corporate authority of the city, for the years 1858 and 1859, upon the real estate of the plaintiff, and also the damages sustained by the plaintiff by reason of the assessment, levy and sale made by the city, in case said assessment, levy and sale should be adjudged to be invalid. The necessary facts appear in the opinion of the court.

*C. Andrews*, for the plaintiff. I. The assessors of the city of Syracuse can assess, and the common council of said city can tax, *only* the land within the corporate limits. (*Laws of 1857, ch. 63, tit. 5, § 22; tit. 6, § 1.*) The lands of the plaintiff are included in the territory taken from said city by the

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act of April 17, 1858. (*Laws of 1858, ch. 341, § 9.*) If that act is constitutional, in so far as it established the eastern boundary of said city, then the assessment, levy and sale in question is void, and the plaintiff is entitled to recover.

II. The constitution vests in the senate and assembly the whole legislative power of the state. (*Const. art. 3, § 1.*) No restrictions upon its exercise can be recognized by the courts, other than those which are specified *in terms* or *necessarily implied*. This results from the rule that written constitutions are to be *strictly construed*. (*Purdy v. People, 4 Hill, 398. People v. Cowles, 3 Kern. 350. Ex parte McCollum, 1 Cowen, 550.*) The power to create or change the boundaries of cities or towns, is plainly legislative in its character. It has uniformly been exercised by the legislature. (*People v. Morrill, 21 Wend. 563, Cowen, J.*) The power is as clearly conferred by the general grant of legislative power, as though conferred in specific terms, and unless specially restrained, it is in the discretion of the legislature, as to the *time* and *mode* of its exercise. (*Benson v. Mayor &c., 24 Barb. 255 to 259. Tanner v. Trustees of Albion, 5 Hill, 121.*) The rule requiring strict construction of written constitutions, is no less imperative when applied to clauses purporting to *restrain* legislative power, than when applied to clauses *granting* such power. (1 *Story's Const. §§ 424, 225.*) *A fortiori* is this true, when the restraint claimed is not by direct limitation but by implication. (*People v. Draper, 15 N. Y. Rep. 532. Sill v. Village of Corning, 15 id. 297. 18 id. 67. 2 Clark & Finn, 36. 21 Penn. Rep. 160. 10 id. 70.*)

III. The 9th section of the act in question is not in conflict with that provision of the constitution which provides that the assembly districts, organized pursuant to the constitution, "*shall remain unaltered until another enumeration.*" (*Const. art. 3, § 5.*) The *incidental* alteration of the boundaries of an assembly district, resulting from a statute changing the boundaries of a city or town, is not an *alteration* of an assembly district, *within the prohibition of the constitution*. 1st. The

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legislature did not intend, nor does the act in question purport, to alter an assembly district. The intention of the legislature, derived from the language of the act, was to exercise an acknowledged legislative power, in amending "An act to revise the charter of Syracuse," and to establish a new eastern boundary thereof. (*Supervisors of Niagara v. People*, 7 Hill, 511, Porter, senator. *People v. Draper*, 15 N. Y. Rep. 545.) 2d. The prohibition against the alteration of assembly districts does not, by *implication*, restrain the legislature, in the exercise of its power to change the boundaries of cities and towns. This prohibition was not intended to apply to the *mere consequences* of the exercise of the legislative power, in the alteration of towns. (*Schuyler county case, opinion of Strong, J.*) The restraining clauses of the constitution are only to be applied to the *identical powers* contemplated by them. They cannot be extended to powers even of a *kindred* nature, but they must be the same in all their essential particulars. (9 *Wheat*. 204.) The power to alter assembly districts, and to change the boundaries of towns and cities, are essentially different, and are reposed in distinct political bodies. (*Const. art. 3, § 5.*) There is no *necessary implication* derived from the clause of the constitution in question, which restrains the exercise of the legislative power. 3d. The restriction upon the legislative power claimed to exist in this case, would result in great public inconvenience. No town, city or county could be organized or changed, where it involved a change, however trivial, in the boundaries of assembly districts, except decennially, and by the first legislature after the decennial enumeration. So, if the disputed boundary between New York and Connecticut should be adjusted by a cession of territory within the present jurisdiction of Connecticut, it could not be annexed to any existing town, intermediate the decennial enumeration. 4th. It is apparent from the scheme of the constitution in respect to the formation of assembly districts, that the prohibition against their alteration was intended as a *prohibition upon the supervisors*, and not a

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restriction of the legislative power to alter and change the boundaries of towns. By the constitution of 1821, there were no single assembly districts. (*Const. of 1821, art. 1, § 7.*) By the present constitution, the power to form assembly districts is *exclusively* vested in the supervisors of the respective counties. The power of the legislature is limited to an *apportionment* of the members of the legislature, among the several counties: it has no power whatever to *form or designate* assembly districts. (*Const. art. 3, § 5.*) The constitution, after vesting in the supervisors the exclusive power to form assembly districts, then limits the power by providing "that the district to be made shall remain unaltered until another enumeration." The primary object of this provision was to regulate the action of the supervisors. The debates in the convention show this to have been the object of the insertion. (*Debates, Atlas ed. p. 422.*) A statute *purporting* to form or alter an assembly district would be clearly unconstitutional, because that power is, by the constitution, reposed in the local legislatures of the counties: but it does not follow that the general power of the legislature to change the boundaries of towns is restrained by a prohibition primarily directed against the supervisors.

IV. By the terms of the constitution the assembly districts to be formed by the boards of supervisors are to consist of convenient and contiguous territory, "but no town shall be divided in the formation of assembly districts." (*Art. 3, § 5.*) Assembly districts will therefore necessarily consist of certain municipal corporations, called towns, and will be so designated and described, and will not be described by physical boundaries and geographical lines. The assembly district is not therefore altered by changing a town line, but still consists of the same towns of which it was formed.

V. If it should be held that the legislature are prohibited by the clause relating to the alteration of assembly districts, from passing an act whereby electors residing in one assembly district become electors in another assembly district, then we

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say, 1st. That the act in question does not *ipso facto* determine the assembly district, or the election district in which the electors residing in the territory taken from the city were entitled to vote. The constitution provides that an elector shall be entitled to vote at any election in the election district of which he shall at the time be a resident, and not elsewhere. (*Const. art. 2, § 1.*) There is no provision in the constitution as to the manner of organizing election districts, or as to the territory which shall compose them. The legislature has power, therefore, to provide that election districts may consist of territory lying in two towns, or of territory partly in a city and partly in a town. The legislature has power also in changing the boundaries of towns, to provide that the territory affected by the alteration shall remain connected with the assembly and election districts to which it originally belonged. This principle was decided in the Schuyler county case. (*See opinion of Strong, J.*) The provision of the constitution that no town shall be divided in the *formation* of assembly districts, has reference only to the time of the general organization of these districts. (*Const. art. 3, § 5. Schuyler Co. case.*) 2d. If, therefore, the legislature had *expressly* provided in the act in question that the territory added to the town of Dewitt should remain a part of the second assembly district of the county of Onondaga, and of the election district to which it was attached at the time the act was passed, no constitutional objection could have arisen. If an *express* provision of this character would have avoided the constitutional objection, then this provision is *implied* without an express declaration, if necessary to sustain the statute. (13 *Barb.* 301.)

VI. There would be no violation of any constitutional provision if it should be held that by the annexation the electors, in the territory taken from the city, were deprived of the right of voting for member of assembly until the next enumeration. A deprivation of the right of voting for a particular officer for a limited period, incident to the reorganization of a town, would not be a violation of the constitution.

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VII. Assuming that the provision in the act of April 17, 1858, annexing the territory taken from the city to the town of Dewitt is unconstitutional, it would not affect the validity of that part of the act which defined the eastern boundary of the city. The result would be that this act repealed the original charter of the city, so far as it took the territory in question from the town of Salina and restored it to that town. (*Fisher v. McGirr*, 1 *Gray*, 22. *Cone v. Kimball*, 24 *Pick.* 361. *Bank of Hamilton v. Dudley*, 2 *Peters*, 526. *Ely v. Thompson*, 3 *Marsh.* 73.) In *Fisher v. McGirr*, the court say: "The principle is now well settled that when a statute has been passed by the legislature, under all the forms and sanctions requisite to the making of laws, some part of which is not within the competency of the legislative power, or is repugnant to any provisions of the constitution, such part thereof will be adjudged void and of no avail, whilst all other parts of the act, not obnoxious to the same objection, will be held valid and have the force of law."

VIII. It is a primary rule in construing statutes claimed to conflict with the constitution, that in cases of doubt every possible presumption and intendment will be made in favor of the constitutionality of the act in question, and that the court will only interfere in cases of clear and unquestioned violation of the fundamental law. (*Sedg. on Stat. and Const. Law*, 482. *Fletcher v. Peck*, 6 *Cranch*, 128. *Morris v. People*, 3 *Denio*, 394. *Newell v. People*, 3 *Seld.* 109. *Ex parte McCollum*, 1 *Cowen*, 550.) The construction of the constitution by the legislature, as given in its acts, ought to have great weight, and should not be overruled, unless manifestly erroneous. (5 *Mass. Rep.* 524, 554. 6 *id.* 401, 417. 12 *id.* 252, 257.) Strong, J. in the Schuyler county case, says: "The power of the legislature to erect new counties is undisputed. It is not restricted as to time or place, or in any respect, except as to the required population. In the exercise of such power the legislature has constituted the county of Schuyler. In doing so, it has necessarily, and without being able to avoid the difficulty, contravened what may be presumed to have

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been the intent of the framers of the organic law, in a comparatively unimportant particular. *The acknowledged power and the presumed intent are antagonistic. Which shall prevail? Most assuredly the former.*" We submit that upon reason and authority the act of 1858 must be sustained.

*H. S. Fulton*, for the defendant. The defendant claims that the provisions of section 9, chapter 341 of the laws of 1858, are in their main scope and object in direct conflict with that part of section 5 of article 3 of the constitution, in these words: "and the apportionment and districts so to be made, shall remain unaltered until another enumeration shall be taken under the provisions of the preceding section;" and that, therefore, all such provisions are void.

I. The main scope and object of the section under consideration is the annexation, the merger of a part of the municipality of Syracuse in, and the enlargement of, the town of Dewitt. It was manifestly as much the intention of the legislature to make the territory in dispute, with the inhabitants residing thereon, for every purpose a part of the town of Dewitt, as to cut it off from the city of Syracuse for any purpose. If this object is not effectually accomplished, there is no ground on which to infer that the legislature would have sanctioned such annexation and its consequences. (*Warren v. Mayor of Charlestown*, 2 Gray, 100.)

II. By the provisions of said section 9, the legislature has attempted an alteration of the second and third assembly districts in the county of Onondaga, within the meaning of the above provision of the constitution, and in contravention of it. (1.) This restriction upon the powers of the legislature was inserted in the constitution for the purpose of rendering assembly districts, when once framed, permanent and unalterable until the next decennial apportionment. Such permanence as is intended by the constitution, can only be attained by the legislature wholly abstaining from taking inhabited territory from, or adding such territory to, assembly districts.

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(3 *Seld.* 83.) (2.) By the provisions of the section under consideration, the territory of the second assembly district is attempted to be diminished by 1200 acres, and its population by 200 persons. In place of the political rights and duties pertaining to these persons as inhabitants of the second assembly district, is attempted to be substituted the political rights and duties of inhabitants of the third assembly district. It is difficult to see how an assembly district can be altered, if this be not an alteration. (*See cases cited below.*)

III. It is submitted, that it cannot be claimed that the provisions of this section are so far valid as to transfer the territory in dispute to the town of Dewitt, for all purposes except the election of member of assembly, and that as to such election, the right of such inhabitants to vote in the election of member of assembly would be suspended until the next apportionment, because, (1.) Such was not the intention of the legislature, nor is it the language of the law. (2.) The suspension of the right of a portion of the inhabitants of an assembly district to vote in the election of members of assembly, would be an alteration of that assembly district within the meaning of the constitution. (3.) Such an enactment would deprive the inhabitants residing upon this territory of rights secured to them by section 1 of article 2 of the constitution.

IV. The provisions of said section 9 are unconstitutional, because of an entire failure to provide any means by which the inhabitants of the territory in dispute, after the annexation, can participate at all in the election of members of assembly. (2 *Gray*, 105.) (1.) The transfer of a whole town from one assembly district to another, without qualification or reservation, would be an alteration of both, and therefore void; while a transfer of such town for all purposes except the election of members of assembly, securing to the inhabitants so residing in such town the right to vote in the election of members of assembly in the district from which such portion is cut off, might not be an alteration of either, and therefore valid. (*Rumsey v. People*, 6 *Cush.* 575, 578. . *Warren v.*

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*Mayor of Charlestown, 2 Gray, 103. 33 Maine Rep. 587. 19 Barb. 91.)*

V. But it is submitted, that part of a town or a city in one assembly district could not be annexed to a town in another district, even with such reservations as would make it necessary for voters residing in such part of such town or city to vote in one election district for state officers, and in another district for member of assembly. Such a requirement would seem to conflict with section 1 of article 2 of the constitution.

VI. The provision of the constitution referred to, applies, as well to an act where its consequences would be to alter an assembly district, as to an act passed for the purpose of altering an assembly district; otherwise all restriction upon the power of the legislature is practically annulled. If 1200 acres and 200 persons can be constitutionally transferred from one district to another, a greater number may, and a greater, until there be not one inhabitant remaining.

VII. Chapter 341 of the laws of 1858 is unconstitutional, by reason of a defect in the title, and because it contains more than one subject. (*Const. art. 3, § 16. 1 Seld. 285.*)

BACON, J. This is a case agreed upon by the parties, for the purpose of presenting for adjudication the question of the constitutionality of the 9th section of the act passed by the legislature on the 17th of April, 1858. This act, by its title, purported to be "An act to amend the act, to revise the charter of the city of Syracuse." The facts necessary to be stated, in order to present this question, are, that in 1857 the board of supervisors of the county of Onondaga, pursuant to the act passed in April of that year, requiring the formation of assembly districts, duly met and divided the county of Onondaga into three assembly districts. By this division the city of Syracuse formed a part of the second, and the town of Dewitt a part of the third, assembly district; that town never having been at any time within the second district.

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By the 9th section of the act of 1858, above alluded to, a portion of the city of Syracuse upon the easterly line of the city, and adjoining the town of Dewitt, was taken from the city of Syracuse and annexed to the town of Dewitt; or, in other words, the easterly boundary of Syracuse was changed by running a line which cut off from the city a territory about two miles in length, and one in breadth, embracing from twelve to fifteen hundred acres of land, on which some two hundred and fifty persons resided, of whom fifty were voters, and annexed this territory to the town of Dewitt. This is the whole scope and purport of the section; and neither in the section, nor in any part of the act, is any provision made in respect to the political *status* of the inhabitants of the excinded and annexed territory; nor how, if at all, they shall be reckoned in regard to any assembly district, or in what manner participate in the election of a representative for such district.

The plaintiff in this suit, at the time of the passage of the act, resided, and still resides, within the territory thus set off, and owned real estate therein, subject to taxation. The authorities of Syracuse, subsequent to the passage of the act of 1858, caused a tax to be assessed upon his property within this district, issued a warrant for its collection, and levied upon and sold some property of the plaintiff to satisfy the tax. The ground assumed by them is that the law, by which this territory was attempted to be set off to another town and assembly district, was unconstitutional and void, and that consequently the territory still remained a part of the city of Syracuse, and liable to contribution toward its public burdens; and that is the precise point presented in this case. The defendant claims that the 9th section of the act in question is in direct conflict with section 5 of the third article of the constitution. This section, after providing that members of assembly shall be apportioned among the several counties of the state as nearly as may be according to the number of their respective inhabitants, directs that the supervisors of

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the several counties shall meet on a specified day, and divide their counties into as many assembly districts as they shall be entitled to by law, each assembly district to contain, as nearly as may be, an equal number of inhabitants, and to consist of convenient and contiguous territory. It is further provided in this section that the legislature, at its first session after the decennial enumeration, shall reapportion the members of assembly, and the boards of supervisors shall meet and divide their counties into districts as before, and then it is added, "*the apportionment and districts so to be made shall remain unaltered until another enumeration shall be taken under the provisions of the preceding section.*"

It may be remarked, preliminarily, that it is not claimed that there is any specific power given, in the constitution, to the legislature to create, or change, the boundaries of cities or towns within this state. But it is claimed that the authority necessarily results from the grant to, and investiture of, the senate and assembly with all legislative power. The power being plenary, no restrictions can be imposed upon its exercise save such as are in terms specified in the constitution, or are necessarily implied therefrom. The power to create towns, or to change their boundaries, is not only legislative in its character, but has been frequently exercised by the legislature; and, irrespective of any provision which would control or circumscribe it, must rest in the discretion of the legislature as to the time and manner of its exercise. All this may be readily conceded; but being so, the question recurs, is not this power, thus claimed and assumed, controlled and restricted in its exercise by a precise constitutional provision, which the action attempted in this case contravenes?

The counsel for the plaintiff, in his very learned and ingenious argument, insists that the act in question is not in conflict with the injunction of the constitution that assembly districts, when organized pursuant to its provisions, "shall remain unaltered until another enumeration," and bases the argument, substantially, upon two propositions: 1st. That

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the *incidental* alteration of the boundaries of an assembly district, resulting from an act changing such boundaries, is not an alteration of an assembly district, within the prohibition of the constitution ; and 2d. That the provision that secures such districts from alteration was intended to be, and is, only a prohibition upon the board of supervisors, and not a restriction upon the legislative power to alter and change the boundaries of towns.

I. In support of the first proposition, it is claimed that the act does not, in its terms, purport to alter an assembly district, and that the purpose of the legislature, as indicated by the title of the act, being to exercise an acknowledged legislative power, it cannot be pronounced void, on the ground that another intent in fact existed, and that it incidentally and indirectly accomplishes an object that could not, without a breach of the constitution, be directly effected. In answer to this suggestion, it might not perhaps be impertinent to remark, that it is sometimes quite unsafe to assume the intent of the law-makers, either from the object apparently avowed, and seemingly patent on the face of the statute, or the language in which they have clothed their enactments. But it seems to me quite clear that if a particular thing is forbidden, in the constitution, and therefore placed beyond the legitimate pale of legislation, the legislature has no more power to override and nullify the provision, although they accomplish it incidentally by attempting to use in a given way another conceded power, than they have to reach the same end by a specific act avowedly for the very purpose itself. If the doctrine contended for is to prevail, then there is no protection to any constitutional provision in its integrity, and all restriction upon the legislative power is practically annulled. If the consequences—the necessary results—of an act are to alter an assembly district, then the constitutional prohibition is as fairly and as indispensably applicable to it as if in terms and by express language it altered the district, and was enacted with that plain and avowed object.

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Now it will not be denied that the main scope and purpose of the section of the act we are considering, was to effect the annexation of a portion of the territory of Syracuse to the town of Dewitt, and to transfer the inhabitants of the district from the former to the latter. There could have been no object in the enactment if it did not accomplish this end. In securing this result, it necessarily follows that both the assembly districts Nos. 2 and 3 are altered. They are altered both in respect to the territory embraced by them, and the number of inhabitants of which they were composed at the time the districts were designated by the supervisors. And it seems to me there is no escape from the conclusion that this is a violation of the constitutional requirement that the districts, when once fixed and determined, should remain, until the next decennial enumeration, unaltered.

What was the object intended to be effected by the mode provided in the constitution for the formation of assembly districts? It was, among other things, to secure as nearly as might be, an equality of representation, as between the several districts into which a county might be divided. This is provided for, in terms, in the section of the constitution in question, by the injunction upon the supervisors, that they shall so divide the districts that they shall contain "as nearly as may be an equal number of inhabitants." And in the division and apportionment made by the supervisors of Onondaga county, in this case, it will be seen that they conformed to this injunction with a very remarkable approach to that enjoined equality. Thus, Onondaga county was divided into three assembly districts, the first containing a population of 24,184, the second 23,851, and the third 24,710.

But the effect of this act, to the extent that it reached, was to impair that equality, and it did so by taking away from the population of the smallest of the districts 250 inhabitants, and annexing them to the district that already had a preponderance of population over either of the others. Thus it trenched upon the representative equality which it

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was the object of the division to secure. If it be said that this was only so small a division of the population that it did not essentially destroy the balance of the districts, I ask, in reply, where shall the line be drawn? If 1500 acres and 250 people may be set off from the city of Syracuse, and from the assembly district to which they had been assigned, what is to prevent the excising process from being extended until half the city has been set over, and thus while one district has been deprived of 10,000 inhabitants, another has been increased to the same extent, and instead of a representative population nearly equal, one has 13,000 and the other 34,000 inhabitants, each having but a single member to represent them in the assembly. And thus the process might go on until practically all but the merest fraction of a town might be set off, and the substantial body of its population transferred to another district.

There were doubtless, also, political reasons which entered into the consideration of the framers of the constitution, when the section we are considering was adopted. It was important to provide for such a construction of the districts that not only the population, *per se*, should be fairly represented, but the political preferences of those residing in the separate districts should have an opportunity to be expressed. In arriving at such a result, the supervisors would naturally, and very properly, group together in a district such a number of towns as would secure to them the election of such candidates as would represent the prevailing and preponderating sentiment of the district; and this being done, this division was to have a degree of permanency attached to it by remaining for a series of years unaltered. But it is easy to see that if this arrangement is to be subject to legislative interference, the whole object and purpose of the division may be entirely circumvented. The political balance of a county might thus be wholly destroyed, and in the foresight or apprehension of a closely contested election, and when a few electors, taken from a strong district where they can easily be spared, and

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thrown into one so nearly balanced that a small importation will turn the scale, the whole state might become the subject of such legislative gerrymandering as to change the entire complexion of the popular branch, and practically defeat the whole design and operation of the single district system.

II. The second consideration urged by the counsel for the plaintiffs to uphold this act is, that the prohibition against the alteration of assembly districts, when once fixed, until the period arrives for another designation, is a prohibition upon the boards of supervisors, and not a restriction of the legislative power to alter the boundaries of towns. If this be so, then it results that the constitutional inhibition is utterly worthless. If it was deemed so important to preserve these districts in their integrity when once formed, that a shield was thrown around them in the organic law, for the very purpose of their protection, and this can be nullified by a simple legislative act, then the paper upon which the section was written might as well have been saved, for the clause is worth less than the rags of which that paper was composed. The section contains no language which points to the board of supervisors as the body on whom the restraint was to act, but it manifestly was intended to cover the whole ground, and prevent as well legislative as any other kind of interference. It will be seen that it preserves not only the districts, but the "apportionment," from alteration; and this was a subject exclusively of legislative cognizance, and the same clause which prevents the legislative authority from tampering with the one, equally places the other beyond their jurisdiction. The counsel for the plaintiff very frankly concedes that a law *purporting* to form or alter an assembly district would be clearly unconstitutional, because that power is reposed exclusively in the local legislatures of the several counties. I have endeavored to show, that what the legislative power could not by a direct act of legislation accomplish, cannot be effected by an indirect and incidental exertion of that power, even upon a subject confessedly within its general and acknowledged pow-

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ers. In order to secure the good sought to be effected by the permanency of the single district system, and avoid the evils it was designed to cure, it was just as necessary to preserve it from legislative interference, as from any tampering with the districts by the boards of supervisors. Once exercised, their power was exhausted, and their work was to remain untouched, for the period prescribed by the constitution, by any other hands. These considerations lead me to the conclusion that the 9th section of the act of April, 1858, being an attempt to alter an election district contrary to the prohibition of the constitution, was unauthorized and void.

But if mistaken in the result to which the discussion thus far has led me, there is another ground which is equally fatal to the plaintiff. Granting that the act is so far valid as that it legally transfers the territory in question from the city of Syracuse, and incorporates it with the town of Dewitt for all other purposes, I think it must be conceded that so far as relates to the election of a member of assembly, the voters residing in the district are, for the time being at least, disfranchised. Where could the inhabitants exercise the privilege of voting? Not in Syracuse, for they are no longer residents of the city; and not in Dewitt, for when that assembly district was formed, this territory was within no election district in that town. The right secured to them by the 1st section of the 2d article of the constitution would thus be violated, and the deprivation or suspension of the right of a voter otherwise competent, by such an act would be, in my judgment, the alteration of an assembly district, within the spirit and meaning of the constitution. This difficulty could in no way be remedied but by a provision in the act itself, securing the right of the inhabitants to vote in the election district from which they had been taken, until the next decennial enumeration. Such a provision was incorporated into the act organizing the county of Schuyler, and was one among the other considerations which was relied upon to secure that act from judicial condemnation. The absence of any such

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provision in the act in question here, is a fatal objection to its validity.

Upon this point we have two well considered authorities in a neighboring state, which cover the whole ground, and are, to my mind, conclusive. I may premise by remarking, that under the constitution of Massachusetts, the power to create and to change the boundaries of towns is derived not from any specific grant on that subject, but from the general power of the legislature to pass all useful and wholesome laws. Their scheme of government also contemplates and provides for an equal representation of the people by a distribution of representatives among the towns, according to the number of taxable inhabitants, at fixed periods of ten years. In the year 1851, the opinion of the judges of the supreme court of Massachusetts was asked by the legislature upon the question of their power to alter the boundary lines of counties and towns. In reply, the judges announced their unanimous opinion to be, that the legislature had that power, but that in exercising it, by annexing a part of one town to another, or by erecting a new town from one or more existing towns, it was necessary to reserve and secure to the inhabitants residing in such portion or portions, a right to vote in the election of representatives with the town or towns from which such portions were taken, until the expiration of the next preceding apportionment of representatives. (*See opinion of the Judges, 6 Cush. 578.*) In another opinion, to be found at page 575 of the same volume, upon a very similar question, it is remarked by the judges, that the constitution declares that the number of representatives for each city, town and representative district, shall remain fixed and unalterable for the period of ten years. "That which the constitution declares unalterable," say they, "cannot be changed by law."

The case of *Warren v. Mayor &c. of Charlestown* (2 Gray, 84 and onwards) is a still more decisive adjudication upon the same point. An act of the legislature had undertaken to transfer the town of Charlestown to the city of Bos-

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ton, and incorporate it with that municipality. The act also attempted to obviate the constitutional objections by various provisions to preserve the right of the people to vote, and securing them a proper representation in the councils of the state. The opinion of the court was delivered by Chief Justice Shaw, and has all the characteristics of his good sense and clear judicial mind. He held the act to be unconstitutional and void, by failing to secure to the inhabitants of the transferred territory the rights which the constitution and laws had guarantied to them. The town of Charlestown and the city of Boston were in separate representative districts. The inhabitants of the former could not vote in Charlestown, for the town as an organized corporation was annihilated, nor in Boston, because its territory was distributed into other districts. No provision was made for uniting them with any other corporation for the purpose of voting, and none that was adequate to enable them to vote in the district from which they had been taken. The inhabitants, therefore, for the time being and for an indefinite term of time, were, in that respect, wholly disfranchised.

The counsel for the plaintiff, pressed by this difficulty, puts forth the proposition, in one of his points, that if the legislature had expressly provided in the act that the territory added to Dewitt should remain a part of the second assembly district of Onondaga county, and of the district to which it was attached at the time the act was passed, no constitutional objection could have arisen. And he adds, that if an express provision would have avoided the constitutional objection, the provision may be *implied*, in order to sustain the statute; or the remedy may be supplied by future legislation. In answer to this, I say that no case ever has carried, or, in my judgment, ever will carry the doctrine of implication, as applied to a legislative act, to such a length as to incorporate into a statute an entire provision—no vestige, nor shadow, nor intimation of which is to be found there. And to the latter branch of the proposition I reply, in the words of Ch. J. Shaw in the

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case above cited: "It is no answer to say that this is a defect which may be amended by the legislature. It would depend wholly on the will of a future legislature whether to amend it or not; whereas the act within itself should make provision for all the changes which it seeks to effect in the rights and condition of the inhabitants."

I will not farther pursue this discussion, nor allude to other considerations which were presented, and forcibly argued, by the counsel for the defendant. Upon the points already passed in review, my conviction is clear that the section of the act of April, 1858, which we have been considering, is a manifest violation of that provision of the constitution which secured the permanency of the assembly districts; and that the action of the defendant in assessing and levying the tax upon the property of the plaintiff, within the territory thus attempted to be set off from the city of Syracuse, was only the exercise on its part of an authority it rightfully possessed.

I ought to add, however, that the case of *Rumsey v. The People*, (19 N. Y. Rep. 41,) which was cited and commented upon by the plaintiff's counsel, is no authority upon the controlling propositions involved in this case. It presented many other questions, and the clause of the constitution which is considered vital and decisive here, is not even alluded to in that case. The reasoning of Judge Strong, however convincing and satisfactory it may be, is not to be taken as the opinion of the court; since, when we come to scrutinize the decision as finally made, it will be perceived that the real ground on which the act, the validity of which was in question there, was sustained, was that the existence of Schuyler county had for years been recognized by all departments of the government except the judicial. Successive sessions of the legislature had been organized and had acted upon the assumption of its constitutional existence, and it had entered into the whole structure and organization of the government. These acts, in the language of the judges who really made the decision, removed the subject from that region of doubt within

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which it is competent and suitable for a court to declare legislative acts void as conflicting with the constitution. In this connection, also, the suggestion may be repeated, that the Schuyler county act contained a provision postponing the operation of the act in respect to the representation of the existing senate and assembly districts, and the election of incumbents to those offices, until the next decennial census ; thus seeking to obviate the difficulty which the act we have been considering makes not even an attempt to surmount.

With regard to this point, the court of appeals, in the case of *Rumsey v. The People*, go no farther in their decision than to say—if indeed they say thus much—that “*it seems*” the legislature have the constitutional power to create a new county by the insertion of such a provision in the act. The case itself, so far as it can be deemed to decide any thing upon this point, would appear by implication to be an authority sustaining the view I have taken of the consequences of the failure of the act in question to provide a mode by which the electors in the excised territory could exercise the privilege of voting in any assembly election district, and thus, by this omission, for an indefinite period, practically disfranchising them.

Judgment in conformity with the stipulation in the case must be given for the defendant.

MULLIN, J., concurred.

PRATT, J., took no part in the decision.

W. F. ALLEN, J., (dissenting.) The parties have agreed to a case and statement of facts, and have submitted the controversy between them to the decision of the court without action, as provided for by the code of procedure. The plaintiff is assessed and taxed by the common council of the city of Syracuse, as a resident of the city, in respect to real property within the bounds of the city as heretofore incorporated, but which was detached from the city and annexed to the

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town of Dewitt, by chapter 341 of the laws of 1858. (*Session Laws*, p. 577.) The question is as to the validity of the act thus altering the bounds of the city of Syracuse and the town of Dewitt respectively, they having been in June, 1857, constituted parts of different assembly districts of the county of Onondaga, by the supervisors of the county, pursuant to the constitution and laws of the state. The change in the boundary lines of the city and town incidentally altered the boundary lines of the two assembly districts.

1. In construing acts of legislative bodies, they must be presumed to have intended only that which is apparent upon the face of the laws enacted by them. Their motives and intents cannot be questioned. If the apparent and well expressed purpose of the act of the legislature is within the legislative power, the validity of the act cannot be drawn in question upon the suggestion that an ulterior object and purpose, not within the scope of the power conferred upon the legislature, was contemplated. In other words, the act having a direct and proper application within the proper exercise of the legislative power, it will not be assumed that the legislature have fraudulently exercised their power and attempted to do that by indirect and circuitous action which they could not do directly. (*Supervisors of Niagara v. People*, 7 Hill, 505, 511. *People v. Draper*, 15 N. Y. Rep. 532, 545.)

2. All legislative power is vested in the senate and assembly of the state, and unless its exercise is restrained by express words of the constitution, or by necessary implication, those bodies are the sole judges of the fitness and propriety of legislative action in a given case; and their acts cannot be questioned or reviewed. (*Const. art. 3, § 1. People v. Draper, supra. Arnold v. Rees*, 18 N. Y. Rep. 57, 67.)

3. The incorporation of cities and villages, the erection and division of towns and counties, and the alteration of their boundaries, are legislative acts, and within the grant of power to the legislature. Plenary power is vested in the legislature to create, amend or divide, to define or alter the boundaries

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of municipal corporations, as cities or villages, or towns and counties, which are mere political bodies and treated as corporations for certain purposes, and which are constituted for the purposes of civil government, unless some restriction or limitation, express or implied, as to the time or manner of the exercise of the power, is found in the constitution. (*People v. Morrell*, 21 *Wend.* 563. *Tanner v. Trustees of Albion*, 5 *Hill*, 121.)

4. There is no restriction or limitation, in terms, in the constitution, upon the power of the legislature to alter the boundaries of the political bodies which it may create from time to time, as the public good may seem to require.

5. The restriction by implication, which is urged to avoid the law, rests upon the provisions of section five of article three of the constitution. Provision is first made, by that section, for dividing the several counties in the state into assembly districts, on the first Tuesday of January next after the adoption of the constitution; the clause expressly prohibiting the division of a town in the formation of the assembly districts. The section then directs the legislature, at its first session after the return of any enumeration of the inhabitants of the state, to reapportion the members of assembly among the several counties of the state, and requires the boards of supervisors in such counties as shall be entitled to more than one member to assemble at such time as the legislature making the apportionment shall prescribe, and divide such counties into assembly districts in the manner before prescribed. And then follows the clause upon which stress is here laid: "And the apportionment and districts so to be made shall remain unaltered until another enumeration shall be taken under the provisions of" section four of the same article. The legislature is prohibited from reapportioning members of assembly among the counties, except at the decennial periods mentioned, and the boards of supervisors are placed under a similar disability in regard to dividing the counties into assembly districts. This is the extent of the prohibitory clause, applying

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it to each body in reference to the duties devolving upon it. As the legislature has no power to constitute and form the assembly districts, the prohibition against altering them does not apply to it. The duty of forming the assembly districts being expressly by the constitution cast upon the board of supervisors, it is necessarily excepted from the grant of legislative powers. And the legislature is prohibited from either performing the same acts itself, or conferring the power upon any other body to do them. As the legislature has no power to form the assembly districts, it necessarily follows that it has no jurisdiction over them to alter or change their boundaries; and without the prohibition referred to, the legislature would have had no authority to reorganize by law the assembly districts as formed by the boards of supervisors, or to alter their boundaries. The act of the boards of supervisors thus charged with the duty would have been final as well upon the legislature as every other part of the government and the public. The prohibitory clause does not therefore detract in the least from, or touch, the power of the legislature over assembly districts. But it does not follow that the legislature may not do what is clearly and confessedly within its power, because it may incidentally and in some of its details affect the work of the board of supervisors; as by changing the actual boundaries of the assembly districts formed by them. It may safely be assumed that the legislature will proceed neither rashly nor recklessly so as either by design or inadvertence, to interfere substantially with the divisions of counties into assembly districts and affect the equality of the representation. If this should be done, the error would doubtless be corrected as soon discovered. But that the legislature may do wrong, is no ground for depriving it of power, by implication. The powers vested in the two bodies are not repugnant to each other; neither is the prohibition upon boards of supervisors, restraining them from altering the assembly districts, inconsistent with the power in the legislature to alter the boundaries of towns or other civil divisions of the state for the public

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good. The power lodged with the supervisors having been executed, is *functus officio* until another census has been taken and another apportionment made; but the legislative power of the senate and assembly may be exercised at any time. It is no alteration of the districts, within the prohibition, so to alter the boundaries of towns or counties, that the territorial limits, the area, or population of an assembly district may be a little greater or less than as fixed by the supervisors. Towns cannot be divided in the formation of assembly districts, and if by addition of territory a town is made larger, the town as enlarged makes a part of the district, and that remains unaltered. It is the same district formed by the supervisors. The legislature cannot by direct enactment oust an individual from office before his constitutional time of office expires; but if in the exercise of the legislative powers of legislation, as by the division of a town or county, a party is ejected from office, the law is nevertheless constitutional. (*People v. Morrell, supra.*) Probably the legislature could not have directed that, notwithstanding the alteration of the boundaries of the city of Syracuse and town of Dewitt, the inhabitants of that part set off and annexed to Dewitt should, until the next census and apportionment, be deemed electors within the assembly district to which but for the alteration of boundaries they would have belonged. That would have divided a town, in the formation of assembly districts, which is forbidden by the constitution. It is incumbent on those alleging a want of power in the legislature to enact the law, to show that it is not within, or is excepted from, the grant of power. A prohibition to exercise a particular power is an exception to the general grant of power; and I look in vain, in the constitution, for an exception or prohibition, express or implied, which would reach this case. The cases cited from Massachusetts, as well as the opinions of the very able judges of the supreme judicial court of that state, in answer to interrogatories of the legislature, (6 *Cush.* 578, and 2 *Gray*, 84,) do not aid us, essentially, in the construction of our own constitution. The two systems

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of state government, including the civil and municipal divisions of the states for election and other purposes, are arbitrary, and so entirely dissimilar in their essential features, that one cannot well be elucidated by reference to the other. The constitutional provisions of Massachusetts are peculiar, and in many respects, if not more stringent than our own, regulate more in detail the action of the legislature over the civil divisions of the state.

I am of the opinion that the act setting off a part of the city of Syracuse and annexing it to Dewitt was constitutional, and that judgment should be given for the plaintiff.

Judgment for the defendant.

[ONONDAGA GENERAL TERM, October 4, 1859. *Pratt, Bacon, W. F. Allen and Mullin*, Justices.]

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 TERPENING and wife vs. SKINNER.

Where the language employed in a will is obscure or ambiguous, and words are made use of, in one connection, with a meaning apparently at variance with the sense of the same words in another clause, extrinsic circumstances may be resorted to, for the purpose of aiding the court in arriving at the intention of the testator.

Among these extrinsic circumstances, the situation of the testator's property, and the condition of his family, and especially of the apparent beneficiaries of his will, are to be considered, and are prominent land-marks to guide the courts in the duty of interpretation.

Where a will was inartificially and clumsily drawn; was prepared by a very unpracticed scrivener, who was poorly versed in the use of language as a medium of conveying ideas; several of its provisions were directly contradictory to each other; it did not, from the manner of its construction, appear to have been the result of much preconsideration; there was a great indefiniteness and uncertainty in the use of the word "heirs;" and there were other incongruities in the will, which tended to obscure its meaning; *Held*, that it was a proper case for resorting to evidence of the extrinsic and surrounding circumstances of the parties, to aid the court in the construction of the will.

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**A**PPEAL from a judgment entered upon the report of a referee. The action was in the nature of a bill for an accounting, and to compel the defendant, surviving executor of the will of Gersham Skinner, deceased, to make sale of certain real estate specified in the will. The plaintiff, Almira Terpening, the wife of the other plaintiff, Amos Terpening, claimed to be a devisee and legatee under the will of the testator, who was her grandfather. The will, which was executed May 4, 1822, was as follows:

"I, Gersham Skinner, of the town of Columbia, county of Herkimer, and state of New York, considering the uncertainty of this mortal life, and being of sound mind and memory—blessed be God for the same—do make and publish this my last will and testament, in manner and form following, that is to say: *First.* I give and bequeath unto my beloved wife Margaret Skinner, one third part of all that my certain farm, situated in the town of Columbia aforesaid; also one third of the barn, the west room of my dwelling house, together with the bedrooms, buttry, chamber and cellar of the the same; also all my household furniture, ironware dresser, dishes, and thirty dollars in money. I also order that John Skinner shall provide fuel for the use of my said wife during her lifetime, in full of the dower of my said wife. I further order, that at the death of my said wife, the lands bequeathed to her shall go to my son John Skinner and his heirs; and the furniture and other property bequeathed, at the death of my said wife, to be equally divided amongst my several daughters and their heirs. And I further order, that the sum of fifteen dollars shall be paid to my said wife in lieu of thirty dollars as heretofore mentioned. I further order, that Isaac Skinner shall have an equal share in my lands in the town of Verona, with my several daughters, instead of those mentioned in Columbia. *Secondly.* I give and bequeath unto my son John Skinner, all that my certain farm, situated in the town of Columbia aforesaid, except what is heretofore conveyed. I also give and bequeath unto my said son John Skinner,

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one wagon, one sleigh, one plow, one harrow, and one horse; and I order that said John Skinner shall pay to my several daughters, as hereinafter mentioned, that is to say: to Margaret Hess or her heirs the sum of twenty dollars, one half in one year and six months, and the remaining half in two years and six months after my decease; unto the heirs of Hannah Myers, late deceased, the sum of twenty dollars at the times last above mentioned, which said sum I order put at interest by my executors until said heirs arrive at lawful age; unto Caty Bloodgood the sum of forty dollars, to be paid at the times aforesaid, and which I order my executors to dispose of as they shall see best for the heirs of said Caty Bloodgood; unto Mary Hess the sum of twenty dollars, to be paid as aforesaid; and unto Amy Hess the sum of twenty dollars, at the times above mentioned. *Thirdly.* I give and bequeath unto my several daughters, Margaret Hess, the heirs of Hannah Myers, Caty Bloodgood, Mary Hess, Amy Hess, all my lands situated in the town of Verona, in the county of Oneida; also all my right to one other piece of land situated in the town of Columbia, whereon there is a saw-mill, being about sixteen acres, adjoining lands of William Gay and Conrad Hess, except that I order Isaac Skinner an equal share with my daughters in the aforesaid lands, except those in the town of Verona, which is to be divided solely amongst my daughters; and I order my executors to sell the above lands, as in their judgment they may see fit, and the money arising from the sales to be paid to my heirs aforesaid, except the heirs of Hannah Myers, to be placed at interest until they arrive at lawful age. I also order the money arising from the share of Caty Bloodgood to be retained by my executors, and by them applied for the benefit of the heirs of said Caty Bloodgood as they may think best. *Fourthly.* I give and bequeath unto my daughter Caty Bloodgood, one two year old heifer. *Fifthly.* I order all my personal property, not heretofore disposed of, divided equally amongst my heirs, after paying all my debts and funeral charges. *Lastly.* I hereby

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appoint John Skinner and John Jones to be executors of this my last will and testament, hereby revoking all former wills by me made."

The testator died in March, 1824. The defendant proved the will, and took upon himself the office of executor, the other person named as executor refusing to act, and having died many years ago. The defendant was the son of the testator. Caty Bloodgood, the mother of the plaintiff, Almira Terpening, deemed herself entitled, under the will, to the rights now set up by the plaintiffs, or, at least during her life, interested in those rights. The defendant took the same view of the effect of the will, and acted accordingly. In the year 1857 the plaintiffs set up that Caty Bloodgood took nothing under the will, and that the defendant must account over to them. The referee gave to the will the construction contended for by the plaintiffs, and decided that the defendant must pay over to the plaintiffs, with interest, the entire share which had been supposed to belong to Caty Bloodgood, and which was many years ago accounted for to her. He also decided that the defendant must pay costs; and a judgment was entered, including costs, amounting to \$973.61. Various exceptions were taken to rulings at the trial, as well as to the report of the referee. The defendant appealed.

*R. Conkling*, for the appellant.

*R. Earl*, for the plaintiffs.

*By the Court*, BACON, J. The result of this suit, and the propriety of the judgment rendered therein, depend entirely upon the construction which is to be given to the will of Gersham Skinner. Both the learned and capable referees by whom this cause has been tried, have given to it a construction which deprives a needy daughter who lived with the decedent on terms of entire friendliness and even affection, and who resided with and took care of him in his last illness, of

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all interest in his estate, and of all share in his ample property, except to the extent of one two-year old heifer, and passes it over literally "to heirs he knew not whom," since the person here claiming was not born until more than a year after the making of the will. Of such a construction it may be susceptible; but to warrant it, the language ought to be pretty clear and explicit, and the circumstances surrounding the transaction such as to lead very strongly to the same conclusion.

In the construction of a will it need hardly be said, since the rule is an elementary one, that the intention of the testator is to govern, if consistent with the rules of law. In arriving at the intention it is also to be remarked, that it is to be ascertained from the whole will taken together, and not from the language of any particular clause or provision severed from its connection and taken by itself; and in regard to the words a testator has employed to convey his meaning, they must be presumed to be used in their usual and primary sense, unless from the context of the will it appears that the testator must have used them in some other or secondary sense. Where the language employed is obscure or ambiguous, and words are made use of in one connection with a meaning apparently at variance with the sense of the same words in another clause, extrinsic circumstances may be called to our aid in endeavoring to arrive at the true intention of the testator; and among these the situation of the testator's property, and the condition of his family, and especially of the apparent beneficiaries of his will, are to be considered, and are prominent land-marks to guide the court in the duty of interpretation.

A glance at the will in question shows it to be not only inartificially, but most clumsily drawn. It was prepared, as the testimony discloses, by an old man by the name of John Jones, who was evidently not only a very unpracticed scrivener, but very poorly versed in the use of language as a medium of conveying ideas. Several of the provisions of the will, also, are entirely contradictory to each other; and it does not from the manner of its construction appear to have been the result of

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much preconsideration, but to have been dictated if not written "*currente calamo*." Thus, in the very first clause, the testator gives his wife one third of his farm and of his barn, and then orders his son to provide her fuel during her lifetime in lieu of dower. He gives her \$30 in money, but before he finishes the clause he orders that \$15 be paid to her in lieu of the \$30. He directs in this clause that Isaac Skinner shall have an equal share with his daughters in his lands in Verona, instead of those in Columbia; and in the third clause of the will he directs that the same Isaac Skinner shall have an equal share with his daughters in his aforesaid lands, "except those in the town of Verona." Thus, while seeming in both instances to be carefully looking after Isaac's interests, totally cutting him off from any share in his estate.

In the use of the word "heirs," throughout the will, the like indefiniteness and uncertainty prevails. In one part of the will it clearly means the testator's own children; in another it is used to designate the issue of his children, and in another it may mean any person, no matter in what relation they stood to the testator, who might by the rules of law inherit from his children.

There are some other incongruities in the will which tend to obscure its meaning, but which need not be particularly specified; since enough already appears to show that this is a case where the extrinsic and surrounding circumstances of the parties are very properly invoked to aid us in its construction.

The testator, besides his son, the defendant, who was his principal devisee, had four married daughters at the time of the making of his will, and one daughter had deceased, leaving several children. For all these the will indicates that he intended to make provision; the children of his deceased daughter representing their parent, and receiving the same portion with the living daughters of the testator, except that their shares were not to be paid until they should respectively arrive at age. But among those daughters there was a remarkable discrimination. The three living daughters, Margaret

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Hess, Mary Hess and Amy Hess, and the children of Hannah Myers, his deceased daughter, were to be paid the sum of \$20 at certain periods after the testator's death, but to his daughter Caty Bloodgood the sum of \$40 was to be paid at the same periods. They were all to share equally in his lands in Verona and Columbia, except that portion which had been devised to the defendant, as well as in his personal property not otherwise disposed of, and over and above what was bestowed upon the others, by a separate clause, a heifer was bequeathed to Caty Bloodgood. These discriminations are, it is true, slight in amount, but they seem to indicate very clearly that the daughter Caty was selected as an object, to some extent at least, of a benefaction beyond her sisters. The key to this, and which will help us to unlock the other passages of the will, will doubtless be found in the condition of Caty in her social relations, and as a member of her father's household. In the latter capacity, as has already been remarked, she was on terms of kindness and affection with her aged father, and aided in nursing and attending upon him in his last illness and until his death, which occurred in less than two years after making the will in question. She was married to one Samuel Bloodgood, while living at her father's house, and continued to reside there with him until the death of Bloodgood, which occurred a little over two years after the marriage, and between the making of the will and the death of the testator. Very soon after the marriage with Bloodgood, and some time before the date of the will, Bloodgood exhibited such evidence of insanity as to occasion great anxiety on the part of his wife and of the family; so that in the language of one of the witnesses, after an incident which he describes as occurring before the time the will bears date, "we had to watch him close, had to hide knives and forks to keep him from destroying himself and family." This state of things continued, and excited continual alarm, until in the month of July, 1823, he evaded the watch which had been kept upon him, and terminated his life by violence. Such a state of things as this would

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naturally beget a desire on the part of a kind father to favor his unfortunate daughter, thus haunted with the perpetual apparition of a "skeleton in her house," and to put his intended bounty in such a position that it would most benefit her, and any family she might leave, and not be subjected to the power or caprice of an insane man.

With this state of things in view, the language of the will becomes comparatively plain, and the interpretation, to my mind, is quite obvious. If the construction for which the plaintiff contended is to prevail, the daughter whose condition demanded the most sympathy, and whose wants required the most aid, is to be much worse off than her sisters who do not appear to have been in any particular necessity, nor to have been objects of special favor. What reason can be given to authorize us to conclude that a father should thus discriminate, not in favor of but against a dutiful daughter, whose condition was more precarious than that of her sisters, and cut her off in her own person from any share in his estate? To warrant this the language should be clear and emphatic, leaving no room for any other construction.

But the words of this will not only do not require this unnatural construction, but are entirely consistent with the interpretation which all the parties had given to them until this suit was instituted, and under which they have acted for more than thirty years.

As to the legacy of \$40, the language used is the same as that employed in the bequest to the other daughters, of their legacies of \$20 each. It is, "I order John Skinner to pay to my several daughters as hereinafter named as follows." Then follow the bequests to Margaret Hess, or her heirs, the sum of \$20, one half in a year and six months, and the remaining half in two years and six months from his decease; "unto Caty Bloodgood the sum of \$40, to be paid at the times aforesaid;" and then it is added, "which I order my executors to dispose of as they shall see best for the heirs of said Caty." The object of this limitation, if such it can be called, was

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obviously to keep the money from falling into the hands of Bloodgood, and to insure its expenditure for the benefit of Caty and her family. If it was best for the family that it should be paid at once to Caty, such payment might be, and indeed was, ordered to be made, the only object being to give the executor a check, if necessary, upon its disbursement. The same limitation occurs in the third clause, devising to his daughters his real estate; and I am persuaded it was to secure the same end, having the like circumstances in view.

The words of conveyance of the estate are precisely the same in reference to all the daughters. If Caty takes no estate, they take none. But this has not been pretended, and cannot be, with any show of plausibility. The subsequent direction as to a sale and division of the proceeds of the land, would not affect the question of the vesting of the estate. That was a matter left to the discretion of the executors; but if they sold, the share of Caty was to be applied for the benefit of the heirs of Caty, "as they should think best." If, in their judgment, it was for the benefit of the heirs to pay it to Caty, they were at liberty to do so. In point of fact, as the case discloses, the whole amount which the share of Caty in the Verona lands produced, was paid over to the plaintiffs in 1844, so that the instruction in the will would appear to have been strictly complied with. But whether it has or not, is not at all important in this suit. If the defendant has not fairly and honestly discharged his trust, he may be called to account by Caty Bloodgood, who is still living, and is the proper if not the only party who can be heard on that subject. This suit, and the report of the referee, has, in my judgment, proceeded upon a radical misconstruction of the will, giving to the plaintiffs rights and remedies to which they are in no respect entitled.

The result is that the judgment must be set aside and a new trial granted, with costs to abide the event.

[ONONDAGA GENERAL TERM, October 4, 1859. *Pratt, Bacon, W. F. Allen and Mullin, Justices.*]

**MATTICE vs. LORD.**

Where leases for years and for lives contained a provision that if the yearly rents reserved should be in arrear or unpaid, in whole or in part, for twenty days after the days of payment, the leases, and the estates granted, should cease and determine, and be and become absolutely void and of no effect; and that the lessor might re-enter, and have and enjoy the premises as of his former estate; *Held* that the enforcement of a forfeiture arising from a non-payment of rent, by a recovery of the possession of the premises in an action against the tenant, rendered the leases void *only from the time the forfeiture occurred*; and did not bar an action by the lessor, for the recovery of the rents due at the time of the default, viz. the same rents, for the non-payment of which the forfeiture was incurred.

The leases are void from the day of forfeiture, but are valid for the previous time.

**T**HIS action was founded on two leases under seal, one for twelve years and the other for two lives. It was brought to recover rents of the lands described therein, which the lessee, in and by the leases, had covenanted to pay. It was provided in each lease, that if the yearly rents reserved "should be in arrear or unpaid or unperformed in part or in all by the space of twenty days next after the respective days and times appointed for the paying and performing thereof, that then, or in either of these cases," the leases and the estates granted should cease, determine and be and become absolutely void and of none effect; and thereupon it should and might be lawful to and for the lessor, his heirs and assigns, into the said demised farms, to re-enter and the same to have again, repossess, retain and enjoy as his and their former estates, any thing in the leases to the contrary notwithstanding. The rents due and unpaid on the first day of January, 1857, with interest thereon from that date to the time of the trial, amounted to \$457.29. The rents that became due on the first day of January, 1853, were duly demanded of the defendant on the first, twentieth, and twenty-first days of that month, but he did not pay them, or express any willingness to pay the same.

The answer in the action contained three defenses: 1st. A denial of the allegations of the complaint; 2d. That the leases

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were void, by reason of an adverse holding of the lands by the defendant and his grantors ; 3d. That the defendant had paid the rents. No other defense was set up in the answer.

The action was tried at the Schoharie circuit in November, 1858. The last action, tried at that circuit prior to the empanneling of the jury in this, was one brought by the plaintiff herein against Lewis Lord, to recover the possession of the lands described in the aforesaid leases ; and in which the plaintiff obtained a verdict, for the reason that the defendant did not pay the rents demanded of him in January, 1853, as above stated. After the plaintiff had established his right to recover the above mentioned rents, and had rested his case, the defendant's counsel offered to prove that the plaintiff in this action had just obtained the verdict of a jury in an action wherein Lewis Lord was defendant, "that the plaintiff recover the possession of the premises described in the complaint in said action." Also that the leases of the premises, proved in this action, and upon which the plaintiff claimed to recover the rents, were for the same premises, a verdict for the possession of which the plaintiff had just recovered. Also that the rents sued for in this action were the same rents for the non-payment of which the forfeiture was incurred, to enforce which the other action was brought. The plaintiff's counsel objected to the evidence as incompetent and inadmissible, upon the following grounds, viz : 1st. That no such matter was pleaded ; 2d. That there was no judgment in the other action, and that it was inadmissible until judgment, if at all, and that there might never be a judgment ; 3d. That the evidence was improper and immaterial, as there could be but one satisfaction, although different remedies might be pursued at the same time ; 4th. That there were rents sued for in this action that occurred prior to, and were not demanded in, the other suit, for which at least this action should lie. The court overruled the objections ; to which decision the plaintiff's counsel excepted. The defendant then proved that the plaintiff in this action had, just immediately before the commencement of the

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trial of this action, obtained a verdict, in an action wherein Lewis Lord was defendant, for the possession of the premises, by reason of the forfeiture incurred by the non-payment of the rent which he claimed to recover of the defendant in this action. The court then charged and directed the jury to find a verdict for the defendant; to which the plaintiff's counsel excepted. The plaintiff's counsel requested the court to charge, that the verdict in the other case was in no way a bar to the recovery in this action for the rent due prior to the accruing of the rent demanded; but the court refused so to charge, and instructed the jury that the verdict in the other action, being the enforcement of a forfeiture under the letting, was an absolute bar to any recovery for rent, in this suit; to which decision and charge the plaintiff's counsel excepted. The jury found a verdict for the defendant.

The plaintiff moved for a new trial, upon a bill of exceptions.

*R. W. Peckham*, for the plaintiff, cited *Hinsdale v. White*, (6 Hill, 507,) and *Jackson v. Allen*, (3 Cowen, 220.)

*A. Becker*, for the defendant.

*By the Court*, BALCOM, J. The principal question in this case is, whether the bringing of the action by the plaintiff to recover possession of the demised premises, by reason of the non-payment of rent for the space of twenty days next after it became due, and the obtaining of a verdict in that action, for the possession of the premises, is a bar to this action for such rent.

The lessee covenanted, that if the rent should be in arrear or unpaid for the space of twenty days next after the day specified for its payment, that then the leases and the estates granted should cease, determine, and be and become absolutely void and of none effect; and thereupon it should be lawful for the lessor, his heirs and assigns, to re-enter and have again the demised premises as his and their former es-

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tates, any thing in the leases to the contrary notwithstanding. The plaintiff obtained the verdict, "that he recover the possession of the premises" by reason of the non-payment of the rent that became due on the first day of January, 1853. The authorities show that the plaintiff may recover the rents reserved for the premises up to that day. In 3 *Salkeld*, page 3, it is said: "Lease to W. R. for life, rendering rent at Michaelmas, with a clause of re-entry for non-payment. The rent in arrear, and afterwards the lessor brought an action for the rent. Adjudged, that notwithstanding this action he (the lessor) might still enter for a breach of the condition, for the action for the rent did not affirm the lease, because it shall be intended to be brought as for a duty upon the contract." (See 2 *Platt on Leases*, 470.) In *Hartshorne v. Watson*, (4 *Bing. N. C.* 178; 33 *Eng. Com. Law Rep.* 312,) the lease contained a provision, that if the rent should be in arrear for fourteen days, it should be lawful for the lessor to re-enter, and the premises to have again, as if the indenture had never been made. The lessee assigned the premises, and on six quarters' rent falling in arrear, the lessor re-entered, and the assignee contended that by the re-entry the lease must be considered as never having had any existence, and, consequently, that the lessor had no right of action; but the court held the proper construction of the proviso to be, that from the time of re-entry the lessor should have the land, as if the indenture had not been made, and that the assignee was liable. "It would be singular (said Tindal, C. J.) to hold, that to an action for rent, on an instrument under seal, the lessee or assignee might plead non-payment, but that the lessor entered for non-payment: in other words, might deprive the lessor of his rent, because he declined to submit to any further loss." The above statement of the case of *Hartshorne v. Watson* is contained in *Platt's Treatise on Leases*, (vol. 2, pp. 331, 332,) and it is fully sustained by the case as reported at length, which I have examined. (See *Taylor's Landlord and Tenant*, 60.)

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The leases in the case at bar became void as to the rent reserved, only from the first day of January, 1853, by the enforcement of the forfeiture caused by the neglect to pay the rent which became due on that day, for the space of the next twenty days, and the demand of it at the proper time in such month. (*Doe v. Paul*, 3 Car. & Payne, 613. *Taylor's Landlord and Ten.* 60. 2 *Platt on Leases*, 338.) Possession of the premises was lawfully withheld from the plaintiff prior to the first day of January, 1853, but unlawfully subsequent to that day. He might have recovered damages for such unlawful withholding, in the action for the recovery of the possession of the premises, if the complaint therein had been framed with that view. (*Code*, § 167, *sub.* 5.) And he may yet recover such damages, by action. (*Id.* § 455. 2 *R. S.* 310, 311. *Holmes v. Davis*, 21 *Barb.* 265.) These views are sustained by those expressed in *Hinsdale v. White*, (6 *Hill*, 507.) The court in that case said: "The lease is indeed void from the day of the forfeiture, but is valid for the previous time. Compensation for possession continued after that time must be recovered by an action for mesne profits." And the decision in that case was fully approved by the court for the correction of errors in *McKeon v. Whitney*, (3 *Denio*, 452.)

The foregoing views are sustained by other authorities; but I need not cite them; and it is unnecessary to pass upon any other question in the case. The verdict in the action must be set aside, and a new trial granted; costs to abide the event.

Decision accordingly.

[TOMPKINS GENERAL TERM, November 15, 1859. *Mason, Balcom and Campbell*, Justices.]

GAGE *vs.* SIMON L. and JOHN H. BREWSTER.

A junior mortgagee, coming to redeem mortgaged premises from a sale under a decree of foreclosure in a suit upon a prior mortgage, must pay, not only the amount of principal and interest due upon the prior mortgage, but the costs of the foreclosure suit; notwithstanding he was made a party to such suit.

ON the 9th of January, 1855, James Thompson was seised in fee of a small parcel of land in the town of Brighton, in the county of Monroe, and on that day executed and delivered to Amos O. Miller a mortgage thereon, to secure the payment of \$400, in four annual payments. On the 29th of February, 1856, Thomas Ryder, being seised in fee of the same premises, executed a mortgage thereon, with other premises, to the plaintiff, to secure the payment of \$700 in one year; and on the 24th of June, 1856, executed another mortgage to the plaintiff to secure the payment of \$500, with interest, in eighteen months. These last mentioned mortgages were duly recorded the day they were dated, respectively. On the 20th of March, 1858, a foreclosure of the two last mortgages was commenced, Thomas Ryder and Charlotte his wife being made defendants, and on the 15th of April the usual judgment of foreclosure was entered in the action. On the 17th of June, 1858, the premises were sold on this judgment, and the plaintiff became the purchaser. On the 24th of April, 1858, the defendants having become the owners of the first mentioned mortgage, commenced a foreclosure thereof by an action in this court, and on the 6th of July, 1858, the usual judgment of foreclosure was entered. To this action the plaintiff was not made a party. The defendants proceeded to advertise the property for sale, when the plaintiff accidentally discovering that the defendants' mortgage was a lien on a portion of his own land, paid the defendants the amount of their mortgage, principal and interest, under an agreement that the money so paid should apply on the judgment, first, in payment of costs, and the balance on the mortgage debt, unless the court should decide, in an action to be brought to

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redeem, that the plaintiff was entitled to redeem the premises without paying the costs of the foreclosure; in case such decision should be made, then the whole sum should be applied on the mortgage debt. The plaintiff then commenced this action, praying that the defendants be adjudged to discharge the said mortgage of record. The judge before whom the cause was tried at the circuit, decided as matter of law upon the facts found, that the plaintiff was not entitled to redeem the premises from the lien of the mortgage held by the defendants, and to have the same discharged upon paying the amount unpaid thereon, with interest, unless he also paid the costs of the said defendants in the action brought by them to foreclose the same. He therefore dismissed the plaintiff's complaint, with costs, and the plaintiff appealed.

*W. F. Cogswell*, for the appellant.

*J. O. Cochrane*, for the respondents.

*By the Court*, T. R. STRONG, J. The plaintiff derives title to the premises in question through the foreclosure of two mortgages, executed by Thomas Ryder to him, and a purchase by him of the premises at a sale thereof in the foreclosure suit. Ryder received a conveyance of the title expressly subject to the payment of the defendants' mortgage. The premises thereby became the primary fund for the payment of the mortgage debt to the defendants, and Thompson, the mortgagor in the defendants' mortgage, who executed a bond in connection with the mortgage, a mere surety. This was the state of things at the time of the mortgage and the sale to the plaintiff, and it continued afterwards.

Now the defendants, in the suit for the foreclosure of their mortgage, have obtained a judgment of foreclosure and sale, with the usual provision, as I understand, making Thompson personally liable for any deficiency, upon a sale of the premises,

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of the proceeds to pay the debt and costs. As against Thompson, the defendants certainly are entitled to collect the costs; and if Thompson should be compelled to pay the costs, he would either be entitled to the benefit of the judgment for his indemnity, or to an action against the plaintiff personally, to recover the sum paid. Whichever remedy he would be entitled to, it would be inequitable to allow the judgment to be enforced against him and require him to have recourse to that remedy. Full justice may be administered in this suit, and circuity of action avoided.

In my opinion the plaintiff was equitably bound to pay the costs in the defendants' judgment, to entitle him to redeem; and that the judgment at special term should be affirmed with costs.

[MONROE GENERAL TERM, December 5, 1859. *T. E. Strong, Welles and Johnson, Justices.*]

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**WHITTAKER and MOORE, assignees, &c. vs. MERRILL  
and others.**

A right of action for the conversion of promissory notes will pass to the assignees of the owner, under a general assignment executed by him, of all his property, for the benefit of creditors.

But where the assignees count only upon a conversion subsequent to the assignment, as shown by the refusal of the defendants to deliver the notes, on a demand made in their behalf, and they give evidence tending to sustain that claim, it is not competent for them afterwards to avail themselves of the original right of action, so assigned to them, for a conversion previous to the assignment.

The objection, in such a case, is not one of variance between the proof and the pleading, but is an objection to proving and recovering upon another and entirely distinct cause of action from that alleged in the complaint.

And the assignees being thus restricted to a cause of action accruing after the assignment, proof of a previous seizure of the notes, under an attachment issued against the assignor, will be fatal to the action.

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**A**PPEAL from a judgment entered at a special term, after a trial at the circuit. The action was brought for the conversion by the defendants of three negotiable promissory notes, amounting in the aggregate to \$2101.42 of principal, made by Daniel Tompkins, and payable to Clinton Evans, or bearer, the assignor of the plaintiffs. On or about the 1st of August, 1854, the defendants converted these notes to their own use. On the 8th of August, Evans, the owner of the notes, made a general assignment to the plaintiffs for the benefit of his creditors. On the 28th of August, 1854, the plaintiffs, in their character of assignees, demanded the notes of the defendants, and they refused to give them up, and immediately thereafter this action was commenced, and was tried at the circuit in Steuben county, in May, 1859. The defendants proved the commencement of a suit against Evans, and the issuing of an attachment, and levy of the same on the notes, before the assignment by Evans. (*See 28 Barb. 526, S. C.*)

The court directed the jury to find a verdict for the defendants. The plaintiffs appealed.

*John Maynard*, for the appellants.

*Geo. T. Spencer*, for the defendants.

*By the Court*, T. R. STRONG, J. Assuming that there was a conversion by the defendants of the notes in question, either by the mode in which they obtained them from Converse, the agent of Evans, or as evidenced by their refusal to deliver them to Converse when he demanded them, the cases of *McKee v. Judd*, (2 Kern. 622,) and *Waldron v. Willard*, (17 N. Y. Rep. 466,) are decisive that the cause of action for that conversion, passed to the plaintiffs by the general assignment made to them shortly afterwards by Evans, of his property, debts and effects; and that, aside from a question of a defense by a levy under the attachment, the plaintiffs might

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have counted and recovered upon that cause of action. The schedule annexed to the assignment, as forming part thereof, in terms embraces the notes, and states that they were then in the hands of, or under the control of, the defendants, and were wrongfully withheld from them by Evans. The assignment, independent of the schedule, is comprehensive enough to include that cause of action; and it is manifest, from the language of the schedule, that it was intended to be transferred. In the case first cited, it is held that a cause of action for the conversion of chattels is assignable; and in the other case it is adjudged, that where it is apparent from the terms of the assignment of goods delivered to a common carrier to be carried, and which he had neglected to deliver, that it was intended to assign also a demand for a breach of the contract of carriage, although not so expressed directly, the assignment will have that operation. Those principles are directly in point in the present case.

But the plaintiffs have counted only upon a conversion subsequent to the assignment, as shown by the refusal of the defendants to deliver the notes on a demand in their behalf—a cause of action accruing to them directly, and not to their assignor, and assigned to them—and they gave evidence tending to sustain it. I think it was not competent for the plaintiffs, under the complaint, after giving such evidence, to avail themselves, against the objection of the defendants, of the former cause of action. The objection is not of variance between the proof and the pleading, but to proving and recovering upon another and entirely distinct cause of action from that alleged in the complaint.

Restricting the plaintiffs to a cause of action accruing after the assignment, the previous seizure of the notes under the attachment seems to be fatal to the action. It was decided in this case, when formerly before the court at general term, that the levy could not be impeached collaterally, by evidence that the notes were obtained by the plaintiffs fraudulently, with a view to such a seizure.

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With these views of the case, no error to the prejudice of the plaintiffs was committed at the trial; and the judgment should be affirmed.

[MONROE GENERAL TERM, December 5, 1859. *T. R. Strong, Welles and Johnson*, Justices.]

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INGERSOLL *vs.* HALL, WRIGHT and others.

A covenant, in a deed of conveyance, by which the grantors agree to warrant and defend the premises, against themselves, their heirs &c., and against all persons claiming or to claim the same, against the acts of the grantors, "hereby intending to warrant and defend the said premises against any lien, judgment or incumbrance against any of the grantors, affecting the premises or any part thereof," is merely a covenant for quiet enjoyment.

The mere purchase of an outstanding title, subject to a life estate in the premises, by a grantee whose title is also subject to that life estate, the owner of which outstanding title had given notice of his right, and of his intention to enforce it, is not a breach of such a covenant; nor will it amount to an eviction, where there has been no interference with the possession, under the outstanding title.

**A** PPEAL from a judgment entered upon the report of a referee. On the 4th of December, 1856, the plaintiff and others conveyed to the defendant John S. Wright certain lands in the county of Monroe, by a deed which contained the following covenant, and no other, viz: "And the said parties of the first part, for themselves, their heirs, executors and administrators, do covenant, grant, bargain, promise and agree, to and with the said party of the second part, his heirs and assigns, to warrant and for ever defend the above granted premises, and every part and parcel thereof, now being in the quiet and peaceable possession of the said party of the second part, against said parties of the first part, their heirs, executors, administrators and assigns, and against all and every person or persons claiming or to claim the said premises, or any part thereof, against the acts of the said parties of the first part;

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hereby intending to warrant and defend the said premises against any lien, judgment or incumbrance against any of the parties of the first part affecting said premises, or any part thereof." This was inserted specially and designedly, in view of a judgment that the plaintiff claimed was no lien, and which the defendant Wright feared was. To secure the purchase money, Ingersoll took back the mortgage which this action is brought to foreclose. Before this conveyance by the plaintiff, a judgment had been recovered against him, upon which his interest in the premises had been sold and purchased by one John Fitts, the plaintiff in the judgment. On the 13th of December, 1856, Fitts assigned his certificate of sale to Joseph A. Eastman. The land not being redeemed, Eastman, on the 25th of November, 1857, received the usual sheriff's deed of Ingersoll's interest. The plaintiff was the owner of an undivided moiety of the land, subject to a life estate of John Fitts. On the 16th or 17th of December, 1856, Fitts conveyed his life estate to the defendant Joseph Hall. On the 20th of December, 1856, Wright conveyed the remainder, acquired by his deed from the plaintiff, to the defendant Hall, who assumed to pay the mortgage in suit, as a part of the consideration money. On the 18th of February, 1858, Eastman conveyed the premises to the defendant Hall, for the actual consideration of \$1200.

It appeared that Wright knew of the judgment when he purchased of the plaintiffs; and that Hall knew of the judgment when he purchased of Wright. John Fitts is still living. No legal proceedings have ever been taken to obtain possession of the premises under the sale upon the judgment. While Eastman was the owner of the title claimed by him under said judgment, he took no legal proceedings to oust Hall from his possession of the premises, but Eastman, before Hall purchased his interest in said premises, notified Hall of his right thereto, and that he should enforce the same as soon as he could. The defendants sought to abate the mortgage of the plaintiff to the amount paid by Hall for Eastman's title.

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The referee found as conclusions of law from the facts, that the covenant in the deed from the plaintiff and others, to the defendant Wright, was a covenant merely for quiet enjoyment, and that there had been no breach of that covenant; that Eastman, by the sheriff's deed, acquired all the interest which the plaintiff had in the mortgaged premises on the 11th of April, 1856, which interest the plaintiff conveyed by the deed dated December 2d, 1856; that no relation existed between Hall and Eastman that could prevent Eastman from enforcing his claim to said premises under the sheriff's deed; that neither of the defendants had any right to abate the whole or any part of said \$1200 so paid by Hall, to purchase the interest of Eastman in the land, from the amount due on the mortgage; and that the plaintiff was entitled to judgment for the foreclosure and sale of the mortgaged premises in the usual form, and was entitled to be paid upon such sale the amount due as aforesaid, with interest and costs. The defendants appealed.

*Wm. F. Cogswell*, for the appellants.

*Danforth & Terry*, for the respondent.

*By the Court*, T. R. STRONG, J. I am satisfied that the covenant in the deed from the plaintiff and others to the defendant Wright is merely for quiet enjoyment. The first clause is in the usual form of such a covenant; and the latter clause defines in part what the former is to embrace—"hereby intending," &c. There is nothing in the last clause manifesting an intention to vary the nature of the covenant, or to do more than to make it certainly applicable to disturbances of the possession by virtue or in consequence of "any lien, judgment or incumbrance," &c. as in that clause mentioned. It was not necessary in order to bring such disturbances within the covenant; and its insertion must be referred to a spirit of

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great caution. The legal import and effect of the covenant are wholly unaffected by it.

I am also satisfied that upon the facts proved, and under the authorities in this state, there has been no breach of that covenant. The mere purchase of an outstanding title, subject to a life estate in the premises, by a grantee, whose title is also subject to that life estate, the owner of which outstanding title had given notice of his right, and that it was his intention to enforce the same as soon as he could, is not, under our law, an eviction. There has been no interference with the possession under the outstanding title; and no submission to the title further than always occurs on the purchase of such a title.

In my opinion, therefore, the judgment, at special term, should be affirmed with costs.

[MONROE GENERAL TERM, December 5, 1859. *T. R. Strong, Welles and Johnson*, Justices.]

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L. D. WARFIELD *vs.* MOSES B. WATKINS.

S., the maker of a note, and the plaintiff and W. his sureties, being sued thereon, the plaintiff, before judgment, paid to the holder one half of the amount due on the note, and costs. The holder thereupon, by a written agreement acknowledging that he had received from the plaintiff \$45 in full for his share of the note, as one of the sureties, discharged him from all further liability thereon, and agreed to use due care and diligence in the collection of the note and costs out of S.; and when collected, to pay the plaintiff one half of all he should be able to collect on the note. *Held*, that the payment, by the plaintiff, of a part of the costs of the action on the note, being a payment of what he was not, at the time, under a legal obligation to pay, formed an ample consideration for the agreement of the defendant. And this, whether the action had been previously discontinued or not.

In such a case, the holder, having agreed to make the effort to collect the note of the principal, is bound to do so, by resorting to legal proceedings, if necessary.

And in an action against him, upon his agreement, it will not be a valid defense for the holder, that the principal might, by reason of the payment to such holder, by the plaintiff, of one half of the note and costs, and by the

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other surety, subsequent to the agreement, of the other half of the debt, have successfully defended an action against him on the note. For *non constat* that the principal would, if sued, have availed himself of the payments by the sureties, or have been able to establish that his liability on the note was discharged.

There is no such impossibility of performance, in such a case, on the ground of the principal having been discharged by the payment of the note, as will relieve the holder from the obligation of his contract.

Costs do not become a debt against a party to an action, until judgment; unless he agrees to pay them.

THIS was an appeal from a judgment of the county court of Yates county, reversing a judgment rendered by a justice of the peace in favor of the appellant, who was the plaintiff below, for \$46.88, damages and costs. The facts out of which the alleged cause of action arose are as follows: On the 26th of January, 1855, one Scott as principal, and Alonzo Watkins and the plaintiff as his sureties, made their promissory note for \$75, payable to Samuel Miller or bearer, one year from its date. The note was transferred to Charles C. Sheppard, who brought an action upon it, in the supreme court, against all the makers. Before judgment Sheppard sold the note to the defendant, who paid therefor the whole amount due on the note, and also \$9.50 costs of the suit, making in all \$90. There was no evidence that the suit was discontinued by express arrangement when the defendant thus succeeded to the interest of Sheppard therein. After the purchase, and on the same day, the plaintiff paid the defendant one half of the note and costs, (\$45.) The defendant, on receiving the money, entered into an agreement in writing with the plaintiff, in which, after reciting the bringing of the suit by Sheppard in the supreme court, and that the defendant had purchased the note of Sheppard and paid him therefor \$80.49 and also \$9.50, the costs of the suit, and also that he had received of the plaintiff \$45, in full for his share of the note as one of the sureties thereon, and discharged him from all further liability on said note, the defendant agreed to use due care and diligence in the collection of the note and costs out of Scott, the

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principal, and when collected to pay the plaintiff one half of the said note and costs; that is, one half of all he should be able to collect on said note. Shortly after the execution of this agreement, Alonzo Watkins paid his half of the note. Scott was out of the state when the agreement was made, but returned in May, and died in June, 1856. On the 2d of July, 1856, the plaintiff brought this action for a breach of the agreement, alleging that the defendant had violated the same in not using diligence in collecting the note of Scott. The cause was tried by a jury. At the close of the plaintiff's proof, the defendant moved for a nonsuit on these grounds, among others: 1. That the agreement was void for want of consideration; and 2. That the note in question had been paid, and could not therefore be enforced against Scott by the defendant. The motion was denied, and the jury rendered a verdict for the plaintiff, upon which the judgment was entered. The plaintiff appealed.

*Daniel Morris*, for the appellant. I. Was the contract void for want of a consideration? Warfield was liable to the defendant, when he purchased said note of C. C. Sheppard, for the principal and interest, but not for any costs; costs could not be enforced against any one, after the suit was discontinued. Yet Warfield paid the defendant \$4.50, half of said costs, which was included in the \$45 named in said agreement, and furnishes a valid and absolute consideration.

II. Was the note a paid note, as claimed by the defendant? (1.) This was a question of fact for the jury, and if there is evidence both ways, their finding is conclusive. (*Rogers v. Ackerman*, 22 Barb. 134.) (2.) The agreement requires the defendant "to use due care and diligence in the collection of the said note and costs out of said Scott." How could this be if it was paid? Harpending testifies, "The note was to be kept alive against the principal, Scott, and enforced against him." No valid objection was made to this evidence; hence it was properly before the jury. "Parol evidence is always admissible to apply

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a written contract to the facts, and its practical execution in reference to such facts." (*Spencer v. Babcock*, 22 Barb. 326.)

(3.) The defendant continued to hold the note, and signified he held it to be enforced by him against the principal, Scott.

(4.) Nothing was indorsed as paid on the note, but a receipt was taken containing a clause repudiating payment; for it required the defendant to enforce the note, not to cancel it, thus specifying what was to be done with it.

(5.) Afterwards the plaintiff is urging the defendant to collect the note against Scott. The defendant then holds the note, and is making efforts to procure a judgment in his own name against Scott. Here is the defendant's act long after the execution of the agreement, showing the note was not paid, and the jury had a right to say, from the evidence and the acts of the parties, the money advanced by Warfield to the defendant was a deposit, not to be applied in satisfaction of the note, to the end that the note might be enforced against the principal.

(6.) A further view, and one of much weight, is this: Where a contract admits of two significations, the one must be adopted which renders it operative, rather than that which will render it void. (*Archibald v. Thomas*, 3 Cowen, 284.) The agreement in question was drawn for some purpose. What was that purpose? The jury have from its contents and all the evidence given the agreement effect, by making it operative; whereas the county court, by its judgment, has adopted a signification which renders it void. A further rule of law is, if the intention of the parties be doubtful, the construction is to be adopted which is most beneficial to the promisee. (*Marvin v. Stone*, 2 Cowen, 781.)

(7.) It is a usual thing for a surety to advance money to be held in deposit, thereby keeping the note in life, and by so doing, a surety who pays a debt of his principal has a right to be put in the place of the creditor, and to avail himself of every means proposed by the creditor to enforce the payment against the principal. (*New York State Bank v. Fletcher*, 5 Wend. 85, 89. 10 John. 524. 2 E. P. Smith, 336.) Suppose the defendant had sued Scott,

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could he have set up the fact that the note had been paid? Suppose the defendant had sued all the parties, and had obtained a judgment, and Warfield had paid the judgment, could he not have enforced the judgment against Scott? Much more in the case at bar, where the note is not canceled, nor taken up, but held by the creditor with and for the express purpose of enforcing the same against the principal.

*James C. Smith*, for the respondent. I. The note in question having been paid, could not have been enforced as against Scott, and the defendant's agreement to collect it of Scott was therefore impossible to be performed, and void. (1.) An agreement which is impossible of performance is utterly void, and no action can be maintained on it. (1 *Parsons on Cont.* 382, note b, and authorities and cases there cited.) (2.) The defendant's agreement in this case was impossible to be performed, because the note which he undertook to collect had been paid. One half of it was paid by the plaintiff to the defendant at or before the time of making the agreement in question, and the plaintiff was thereupon discharged from his liability on the note. Subsequently, Alonzo Watkins paid his half of the note to the defendant. The precise date of this payment does not appear: it was made after the note came from Penn Yan, that is, after the defendant bought it. And probably soon after, because the defendant bought it at his brother's request. The plaintiff was obliged to receive the amount of the note when it was offered to him by Alonzo Watkins; indeed, a tender of the money, even if unaccepted, would have defeated an action on the note. There is no conflict of testimony as to the question of payment—the testimony is all one way; and as to the payment made by the plaintiff, there is no question of fact. Upon the facts stated in the agreement, which of course cannot be disputed, the note was extinguished *pro tanto* by the plaintiff's payment; and even if the balance of the note had not been subsequently paid, the plaintiff was not entitled to recover, in any event, more than one half of the

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amount unpaid, and the judgment rendered by the justice was too large, and therefore properly reversed. The plaintiff himself had a cause of action, and the only cause of action against Scott, for money paid at his request, and it is owing to his own negligence alone, that Scott was not prosecuted. The talk between the parties that the note was to be "kept alive," notwithstanding the payment, amounted to nothing, for the parties could not make an arrangement whereby Scott would be liable at one and the same time to the defendant on the note as unpaid, and to the plaintiff for having paid it.

II. We contend also that there was no consideration for the defendant's agreement. There is no evidence that the suit commenced by Sheppard was discontinued *before* the making of the agreement in question. It certainly was not discontinued by the bare fact of the defendant's purchasing Sheppard's interest in the action, and paying him the amount of his claim and costs, unless there was an express agreement to that effect, of which there is no evidence. The defendant as Sheppard's assignee had a right to prosecute the suit, and if he had done so he would have obtained judgment for the whole amount of the note and the costs of the action, against all the makers of the note; and if the judgment had been collected of the sureties, they could have maintained an action against the principal, for the costs paid by them, as well as the debt. When the suit was settled by the plaintiff's paying one half of the amount, the defendant, as Sheppard's assignee, had a right to the costs, the same as if the suit had gone to judgment. (*Code*, § 322, *5th ed. and notes*.) The plaintiff therefore paid no more than he was legally bound to pay. There is certainly no such evidence in the written agreement. Nor does Harpending testify that the suit was discontinued. He merely states that he advised the plaintiff that he was not liable for any of the costs; but it does not appear that the defendant was present, and if he was, Harpending merely expressed his opinion on a question of law, and it does not appear upon what state of facts his opinion was based. The remark that

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"the plaintiff would have been liable *before the purchase* of the note," &c. was made by the witness on the trial before the justice, and not to the parties at his office. But even if it was made to the parties, it shows nothing more than that the opinion expressed was based upon the bare purchase of the note, for the fact of a discontinuance of the suit is not adverted to by Harpending.

*By the Court*, T. R. STRONG, J. The payment by the plaintiff, of part of the costs of the action on the note, formed an ample consideration for the agreement in question. Whether the action had been previously discontinued or not, makes no difference in regard to this point. If it had been, clearly there was no legal claim against the plaintiff for any portion of the costs; if it had not been, he was under no obligation to pay the costs while the action was pending. Costs do not become a debt against a party to an action until judgment; unless he agrees to pay them. (*Supervisors of Onondaga v. Briggs*, 3 Denio, 173. *Hunt v. Middlebrook*, 14 How. Pr. Rep. 300. *Torry v. Hadley*, Id. 357.) Section 322 of the code has nothing to do with the case. That section merely prohibits the demanding from a defendant, as costs, upon a settlement before judgment, beyond certain rates. It applies only to a case where the settlement is upon the terms of paying costs by the defendant. If a settlement before judgment is without any provision for the payment of costs, the plaintiff loses them. (*Johnston v. Brannan*, 5 John. 268.) He may refuse to settle without payment of costs; so a defendant may refuse to pay them for the purpose of a settlement. If a defendant does agree to pay the costs, on a settlement in such a case, that section regulates the amount. The principle relied upon by the defendant's counsel, that payment of what a party is legally liable for is not a sufficient consideration for a promise, is therefore wholly inapplicable to the present case. There was no legal liability of the plaintiff for costs when the agreement for a settlement was made. He paid what he was not

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at the time under a legal obligation to pay, in consideration of the agreement; and that was a legal consideration.

By the agreement, the defendant agreed "to use care and diligence in the collection of the said note and costs out of the said Scott," the principal debtor in the note, and when the same was collected, to pay the plaintiff one half of all he might be able to collect on the note. I think it is not a valid defense for the defendant in this action upon the agreement, that Scott might, by reason of the payment to the defendant, by the plaintiff, of one half of the note and costs, and by the other surety, subsequent to the agreement, of the other half of the debt, have defended successfully an action against him on the note. The agreement required the defendant to make the effort to collect of Scott; and it was his duty to do so, by resorting to legal proceedings for the purpose, if necessary. Scott might not have availed himself of the payments by the sureties; he was equitably bound to pay the amount of the debt, for the benefit of the sureties, and might not have thought proper to interpose any obstacle to an action on the note itself; and if he had done so, he might not have been able to establish that his liability on the note was discharged. But if he would have defended, and could have prevailed, the defendant having agreed to make the effort to collect the note of him, was bound to do so. He can no more set up that the effort would have been fruitless, than could the holder of a note, in an action on a guaranty for its collection. The answer in both cases is that the contract required it. In regard to an action on a guaranty, *Newell v. Fowler*, (23 Barb. 628,) and the cases there cited, are in point, and I think the principle of them applicable to this case.

The last clause of the agreement does not qualify the defendant's obligation "to use due care and diligence in the collection." It simply limits the obligation to pay over, to what he might be able to collect, on using such care and diligence.

It is argued on the part of the defendant that his agreement, in reference to the collection of the note, was impossible

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of performance, and therefore void. The case of *Beebe v. Johnson* (19 *Wend.* 500) shows there is no force in this position. There was no such impossibility as would relieve from the obligation of a contract.

The view of the case now taken renders the consideration of the question as to the effect of the payment, in regard to extinguishing the liability of Scott on the note, unnecessary. It is also in accordance with the equities of the case. Upon the face of the agreement it is apparent that the parties intended the payment by the plaintiff to the defendant should not affect the liability of Scott on the note; and, in respect to the payment by the other surety, to the defendant, it does not appear that the defendant ever sought to make an arrangement whereby the payment would not impair the obligation of the note against Scott. Whether the note did not remain in life as to Scott, under the circumstances, I repeat, need not be considered.

It follows that the judgment of the county court should be reversed, and that of the justice affirmed.

[MONROE GENERAL TERM, December 5, 1859. *T. R. Strong, Wallis and Smith, Justices.*]

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 RAMSEY vs. LEWIS.

Where one of several sureties takes from his principal a chattel mortgage, to indemnify him for becoming such surety, and afterwards discharges the same without the consent of his co-sureties, he will, by that act, be prevented from calling upon his co-sureties for contribution.

All the sureties have an equitable interest in a security taken by one of their number, for his own indemnity; and to the extent that they are injured by the relinquishment of such security by him, the fact of such relinquishment is a defense to his claim against them for contribution.

**A**PPPEAL from a judgment entered upon the report of a referee. In November, 1852, Owen Edmonston was elected sheriff of the county of Ontario. In December of

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that year, George Clute applied to Edmonston to be appointed a deputy, and gave his bond as such deputy, to Edmonston as such sheriff, with William Crawford, Henry Ramsey, (the appellant,) and Joseph S. Lewis, (the respondent,) as his sureties. The condition of this bond contained a clause in substance, that as often as required by Edmonston, he should account for and pay over to him all fees and perquisites of office, which he (Clute) might receive as such deputy sheriff, according to the rate agreed upon between them, to wit, one half thereof. In January, 1853, Edmonston entered upon his office as sheriff, and appointed Clute as a deputy, who accepted the appointment. The term of office of Edmonston as sheriff, and of Clute as his deputy, expired on the 1st of January, 1856. Prior to this time there had become due and payable from Clute as deputy, to Edmonston as sheriff, a sum of money for one half of certain fees collected. On the 19th of April, 1856, Ramsey took from Clute a chattel mortgage on a large quantity of personal property, which mortgage was duly filed in the proper town clerk's office, which recited, among other things, that whereas Ramsey had become surety for him as deputy sheriff upon his official bond, and was going to become surety upon bonds, he did therefore, for the purpose of securing Ramsey for the same, mortgage unto him the said personal property. And it was conditioned in the mortgage that Ramsey should not become liable on the official bond in any way, or be put to any expense, costs, charges or trouble, by reason of becoming surety for him, and if he did, he might sell the property and repay himself. On the 6th September, 1856, Edmonston and Clute accounted together, concerning the fees which were owing from Clute on the 1st day of January, 1856, as aforesaid, and liquidated the same at the sum of \$231.66. On the 8th November, 1856, Edmonston commenced in this court an action on Clute's official bond, against Clute and his three sureties, to recover the sum of \$231.66, at which the said fees were liquidated, and so prosecuted his

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suit that he obtained judgment against them, which was docketed on the 27th day of May, 1857, for \$303.23, of which \$71.57 was for the costs of the action. On the 4th day of May, 1857, Ramsey canceled and discharged the chattel mortgage dated 19th April, 1856, and took another mortgage on the same property, to himself, conditioned to secure certain debts and liabilities, in which he was interested, but of which his liability as such surety was not one. At the time said mortgage was canceled and discharged, it was a valid lien on the property thereby mortgaged, and an ample security for the payment of the debts therein mentioned, and also for the full payment of the said sum of \$231.66, for which Clute and the plaintiff and defendant, and their co-surety, were liable to the sheriff on said official bond of Clute, and all interest which had accrued and costs which had been incurred thereon. Ramsey, on the 28th May, 1857, by virtue of the second mortgage, sold all the property upon which the two mortgages were a lien, and satisfied the debts and liabilities mentioned in that of the 4th May, 1857. On the 29th July, 1857, execution on the judgment recovered by Edmonston was levied and collected of the property of Ramsey, to the amount of \$315.91, a portion of which was for sheriff's fees. To recover of Lewis one third of this amount, Ramsey brought this action. After the cause was at issue, it was referred to William E. Sill, Esq., as sole referee, and was tried before him. The referee found, as conclusions of law, that the defendant had an equitable interest in the mortgage so executed to the plaintiff by Clute, dated April 19, 1856; and had it not been canceled, would have had a right, upon a recovery against him by the plaintiff in this action, to be subrogated, to the extent of such recovery, to the right and portion of the plaintiff under the provisions of the mortgage in regard to said official bond. That in case of such subrogation, the rights of the defendant under the provisions of said mortgage of the 19th day of April, 1856, which were intended as a security against said official bond, would have been

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prior in equity, and as respects order of lien, to any claims of the plaintiff for becoming indorser or surety for Clute after the execution and delivery of said mortgage of the 19th of April, 1856. That the plaintiff having by his own act rendered such subrogation impracticable, and deprived the defendant of his equitable rights under said mortgage of the 19th of April, 1856, was not entitled to call upon him for contribution as co-surety. That the plaintiff, having canceled and discharged a valid and ample security held by him as his indemnity, from his principal, had no right afterwards to require his co-surety to share a common burden, of which the security so held by the plaintiff, had it not been discharged, would have relieved both the plaintiff and defendant. He therefore reported that the complaint in this action should be dismissed, with costs against the plaintiff; and from the judgment entered on the report, the plaintiff appealed.

*D. Herron*, for the appellant, insisted on the following, among other points: I. Where several sureties are bound for the same principal, and upon his default one of them is compelled to pay the money, or to perform any other obligation for which they all became bound, the surety who has paid the whole is entitled to receive contribution from all the others for what he has done in relieving them from a common burden; and this is the doctrine, both at law and in equity. (*See Story's Eq. Jur.* §§ 492 to 497.) The plaintiff, therefore, on proving the bond, the judgment and the payment of the whole amount of the execution, established a right to recover against the defendant the one third part of the amount thus paid.

II. On the issues set up as a defense in the answer, the defendant held the affirmative, and was bound to prove affirmatively all the facts alleged to support them.

III. The defendant, to maintain the fifth ground of defense to the first count, set up in his answer, was bound to

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show that the plaintiff received from a sale of property mortgaged by Clute to secure him on the bond, and from a sale by virtue of such mortgage, \$500 or some other amount; and he was not at liberty, under this part of the answer, to prove or insist that the plaintiff might have received the same, but neglected or failed to do so, or that he improvidently or imprudently canceled a mortgage, by virtue of which he might have received such amount, but thereby put it out of his power to do so.

•IV. It cannot be maintained that the plaintiff had not a right first to secure himself for having done an act which was *essential* to be performed, to render the instrument valid for any purpose. The mortgage of the 19th of April was taken entirely for the benefit of Ramsey. Lewis was not a party to, nor had he any thing to do with it. He had no right to control it in any way, nor had he any right to participate in its benefits, until Ramsey was first *fully* secured for his *individual* liability. It was not given to secure Lewis, nor any other person but Ramsey. Ramsey was entitled, *first*, to full indemnity, for becoming indorser and surety individually, before any other person had a right to share in it to any extent.

V. Ramsey had a right to *elect*, first, to apply the mortgage of the 19th April, to secure his individual indorsements and debts as surety for Clute, before he could be compelled to resort to it to indemnify the sureties on the bond; and Lewis was bound to prove that it was more than sufficient, to some extent, for the former purpose, before he could claim to be *subrogated* to any rights under it. This proof he wholly failed to produce.

VI. The referee erred in holding, as matter of law, that the defendant had an equitable interest in the mortgage of the 19th of April, and would have had a right, upon a recovery against him by the plaintiff in this action, to be subrogated, to the extent of such recovery, to the right and portion of the plaintiff in such mortgage, had it not been canceled. The

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evidence shows other claims and demands against Clute, and against the mortgagor and the property thereby conveyed, to more than the value of the mortgaged property, in favor of Ramsey and Gasper, possessing a superior and prior equity for satisfaction to that of the demand in suit, to satisfy which such mortgage had been canceled and given up, and thereby become fully satisfied, discharged and at an end. Without satisfying such other claims and demands of Ramsey and Gasper, the defendant could *in no event* be entitled to an equitable interest in such mortgage, or to a cession of the plaintiff's rights therein.

VII. The referee also erred in holding, as matter of law, that in case of such subrogation, the defendant's rights under such mortgage to indemnity on the bond, would have been prior in equity, and as respects order of lien, to any claims of the plaintiff for becoming indorser or surety for Clute, after the execution and delivery of such mortgage, for reasons before stated. By so holding, the defendant's right by subrogation to be indemnified against liability on the bond, was made to displace, overthrow and take the position of a perfectly valid claim of the plaintiff, which legitimately arose from, and had its existence by virtue of such mortgage, in pursuance of which it was made.

VIII. It follows, as a necessary consequence, that the further holding of the referee, as matter of law, that the plaintiff had by his own act deprived the defendant of his equitable rights under such mortgage, by cancelling it, that such mortgage was a valid and *ample* security, on the bond, and would, but for such act, have relieved both the plaintiff and defendant from the demand in suit, is equally erroneous; and besides, the referee was not warranted in predicating his decision upon the cancelling and discharge of the mortgage, because no such defense was set up in the answer. Before the referee could consistently hold, as matter of law, that the mortgage of the 19th April was a valid and ample security to indemnify the plaintiff and defendant on the bond, he ought to have

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found, as matter of fact, that it had priority over Gasper's mortgage and execution, which he has not done. On this point, his finding of facts, and also his conclusions of law, are entirely silent. The latter mortgage and execution are entirely thrown out of view, and the decision is based entirely upon the erroneously assumed equitable priority of the canceled mortgage, over Ramsey's subsequently accruing liability as indorser and surety for Clute.

IX. Conceding the principle of equity, contended for by the defendant, that sureties are entitled to the benefit of all securities which have been taken by any one of them, to indemnify himself against any liability, (*Story's Eq. Jur.* § 499,) there is no proof in this case that any such security existed when this action was commenced. There is no proof that any benefit was or could have been derived by the defendant from the canceled mortgage; nor is there proof that it was prior to Gasper's mortgage and execution. The presumption is that it was not, as Ramsey allowed it to be canceled to his own disadvantage, to give place to such mortgage and execution of Gasper. There is no proof that the canceled mortgage was available in the hands of the plaintiff, when his mortgage of the 28th of April was given, to secure any thing more than what he had then indorsed and become surety for Clute, in pursuance of the canceled mortgage. There is no proof that the plaintiff ever in any way derived any benefit from the canceled mortgage, by way of indemnity upon the bond.

X. The plaintiff entirely disproved the 5th ground of defense to the first count, by showing that he received nothing on the security taken for his indemnity on the bond. The defendant had no right *then* to urge a *new* defense, not set up in the answer, that the plaintiff had improperly canceled a mortgage, which, but for that, would have furnished him full indemnity for the demand in suit. This was a different defense entirely from that set up in the answer. The plaintiff was not notified by the pleadings to be prepared, and was not prepared for the trial of such an issue. Had that defense

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been set up in the answer, the plaintiff would have been prepared to show, and would have shown affirmatively, and beyond a doubt, other claims and demands upon the mortgaged property, belonging to the plaintiff and others, of superior equity, and having a better right to be satisfied out of such property than the demand in this action, and to an amount more than sufficient to consume the whole of such property.

XI. But conceding that the defendant had a right to fall back and insist upon the last mentioned defense, then he held the affirmative of that issue, and was bound to prove, affirmatively, that Gasper's mortgage and execution was not entitled to priority over the canceled mortgage, and thus that the latter was available, and an ample security against liability upon the bond.

XII. The defendant, in order to establish his defense to any extent, even if the answer was broad enough to admit the proof, was bound to show, affirmatively, the existence of an available security in the hands of the plaintiff, from which he either did or could have realized some part of the amount paid to satisfy the judgment, and that too without encroaching upon or sacrificing other valid claims against Clute, to an equal amount, embraced in the same security, and that the plaintiff wantonly, unnecessarily and fraudulently, and with the full knowledge that he was thereby sacrificing and destroying the defendant's rights, gave up and canceled such available security.

*Charles J. Folger*, for the respondent. I. Although this is an action at law, by one surety against a co-surety, to recover contribution, yet no consideration of the questions involved in the appeal can be fundamental, which is not based upon the fact, that the ground of the relief afforded to one surety against another does not stand upon any notion of mutual contract, express or implied, between the sureties, to indemnify each other. The relief granted arises solely from principles of equity, and is entirely independent of contract. (*Burge*

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on *Suretyship*, 384. 1 *Story's Eq. Jur.* § 493, and cases cited. *Campbell v. Mesier*, 4 *John. Ch.* 338. *Derring v. Earl of Winchelsea*, 7 *Bos. & Pull.* 270; *S. C.*, 1 *Cox*, 318.) Indeed it was originally doubted whether the claim could be enforced at law. (1 *Story's Eq. Jur.* § 495. *Burge on Suretyship*, 384.) And now the giving of relief is put upon the ground of a common interest and a common burden, on which equity alone bases the liability to contribute. But even then it is not an inflexible rule that a co-surety must contribute. There may exist circumstances which, destroying the equities between the sureties, will relieve him from so doing. (1 *Story's Eq. Jur.* § 498.) The appellant cannot recover of the respondent, unless he shows an existing equity on his side. And it is not enough that an equity once existed; it must still exist when suit is brought. For if it shall appear in the case that he has disregarded the equitable rights of the respondent, and done any thing, or neglected any thing, so that they have been lost, *ipso facto*, he has destroyed his own equitable right to call on the respondent for contribution. Upon the basis of the maxim that he who seeks equity must do equity, he, who from his own deed, or his own neglect, cannot do the equity he might once have done, shall not have the equity he might once have had.

II. By way of the chattel mortgage Ramsey had from Clute an indemnity for becoming surety, which the other sureties of Clute did not possess. Ramsey did not, then, sustain an equal, "a common burden," with the other sureties. In fact, having an indemnity fully equal to his liability, he bore no burden at all. Hence there existed, as between him and the other sureties, no equity, by reason of which he can call on them to contribute to the payment of the debt to Edmonston. The indemnity he had was ample to protect him against loss or damage by reason of being surety. Hence the reason of the rule, by which one surety is made to contribute to another, ceases to exist, in the case of Ramsey, and the rule must cease.

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The ground work of his action is gone. He has no equity. (*Moore v. Moore*, 4 *Hawks' N. Car. Rep.* 358, 360, 1.)

III. A co-surety has the same defense against a co-surety which either would have had against the creditor of their common principal. (*Lowndes v. Pinckney*, 1 *Rich. Ch. (N. Car.) Rep.* 155, 179.) If a creditor, without the consent of the surety, relinquish a subsidiary security which he holds against the principal debtor or his estate, he discharges the liability of the surety *pro tanto*. (*Neimcewicz v. Gahn*, 3 *Paige*, 614, 649. *Baker v. Briggs*, 8 *Pick.* 122, 129.) A co-surety is entitled to any indemnity (or the avails of it) which the co-surety suing for contribution had from the principal debtor, or his estate. Or if the suing co-surety has released or discharged the indemnity, or has collected it and applied the avails to his own use, he cannot recover against his co-surety. (*Theobald on Pr. and Surety*, ch. 11, § 283. *Swain v. Wall*, 1 *Ch. Rep.* 149, 152. *Doolittle v. Dwight's Adm'rs*, 2 *Metc.* 561. *Morrison v. Pointz*, 4 *Dana's Ken. Rep.* 307, 310, 11. *Moore v. Moore*, 4 *Hawks*, 358. *Gregory v. Morrell*, 2 *Iredell's Eq. Rep. (N. Car.)* 233. *Agnew v. Bell*, 4 *Watts' Penn. Rep.* 31. *McMahon v. Fawcett*, 2 *Rand. Va. Rep.* 514. *Bachelder v. Fiske, ex'r*, 17 *Mass. Rep.* 464, 470. *Elwood v. Deifendorf*, 5 *Barb.* 398, 405. *Smith v. Hicks*, 1 *Wend.* 202; *S. C.*, 5 *id.* 48. *Livingston's Ex'rs v. Van Rensselaer's Adm'rs*, 6 *Wend.* 63.) If, then, Ramsey has put it out of his power to place Lewis in as good a position as he had himself, he will be excluded from his demand. He thus releases his co-surety. (*Roberts v. Sayre*, 6 *Monroe's Ken. Rep.* 188. *Cockaigne v. Sumner*, 22 *Pick.* 117. 3 *Paige*, 614. 8 *Pick.* 122. *Hayes v. Ward*, 4 *John. Ch.* 123, 130. *Cheesbrough v. Millard*, 1 *id.* 409, 414. *Chester v. Bank of Kingston*, 2 *Smith*, 16 *N. Y. Rep.* 336.) And the same rule prevails at law in this respect as does in equity. (*King v. Baldwin*, 2 *John. Ch.* 554. See also 1 *Story's Eq. Jur.* §§ 501, 2; 8 *Pick.* 128; 7 *John. R.* 337; 5 *Wend.* 85, 89; 2 *Pick.* 223, 233.) Ramsey had valid and ample indemnity against any loss, by

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reason of being surety for Clute. But this indemnity he saw fit to discharge and give up, or rather he saw fit to direct it to his own exclusive benefit, as security for other debts and liabilities of Clute to him. By giving up and discharging the first chattel mortgage, and taking to himself the property, by a sale under the latter mortgage, he put it out of his power to subrogate the respondent to his rights under the first, and also took from the principal debtor Clute, by so much, his ability to pay the debt to Edmonston, and thus relieve his sureties. Hence he cannot recover of the defendant any part of what he paid. (*See authorities cited above.*)

IV. Nor will it do to say, that the mortgage of the 19th April, 1856, (called the first mortgage,) which secured Ramsey against loss as surety on the bond, was also given for other matters, and that those matters exhausted the avails of it. It could only be held by Ramsey, so far as the rights of others were concerned, for the matters *specifically mentioned* in it. As far as the other matters specifically mentioned in it are concerned, they had, with one exception, all been paid; and the sale produced more than enough to pay this one (a note of \$94.57) and the amount of the judgment in favor of Edmonston. And, indeed, the sale produced nearly enough to pay this judgment of Edmonston, all left unpaid of the mortgage of 19th April, 1856, all liens on the property prior to the mortgage of Ramsey of 28th April, 1856, and the whole of that mortgage. The avails of the mortgaged property should have been applied on the liability secured by it, to the official bond first, and to Ramsey's subsequent liabilities afterwards. This was due to Clute, as tending to release him from three sureties at once. (*Burge on Suretiship*, 131, 136, 137.) The rule of law as to the application of payments would compel Ramsey to apply the avails of the property to the satisfaction of the indebtedness, in the order in which it accrued—paying off the oldest first. And, as between Ramsey and his co-sureties, this doctrine has greater force; for he and they are dealing only with equities. And it was the highest equity,

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that he should devote what he held for their common benefit, to their common relief. (*Burge on Suret.* 127, 8, 131. *Ferris v. Roberts*, 1 *Vernon*, 34. 1 *Sand. S. C. R.* 416, 452, 4.)

V. It does not matter that Ramsey did not know that a definite and fixed liability existed when he took the first mortgage of April 19th, 1856. It is enough that it did exist, and that he took a security, which operated the instant it was delivered, to protect against that liability. By thus taking it, he created for his co-sureties equitable rights, and imposed upon himself equitable obligations, which he was bound to maintain; and when he ceased to maintain them, indeed positively destroyed them, he threw away any right of contribution from his co-sureties.

VI. A *resumé* of the whole case is this: On the 1st *January*, 1856, the deputy sheriff, Clute, owed the sheriff, Edmonston, the debt for fees, on which he subsequently recovered judgment against the deputy and his sureties. Their liability had accrued or was fixed at that date. On the 19th *April*, 1856, Ramsey, one of the sureties, took from the deputy a valid and ample security against this liability. This security in his hands enured in equity to the benefit of all the sureties of the deputy. But this security Ramsey actually canceled and discharged for the purpose of securing debts due him solely. The property which formed this security he afterwards, by virtue of another lien upon it taken by him for his sole benefit, converted into money, and realized much more than enough to have fully satisfied the liability to the sheriff, and the other outstanding liability provided for by the security, which, for his own purposes, he discharged. And the question returns, shall he who has so disregarded and destroyed the equities of his co-sureties, enforce against one of them an action which has no basis but in an equity?

*By the Court*, T. R. STRONG, J. The defendant, as co-surety with the plaintiff in the bond to the sheriff, had an equitable interest in the chattel mortgage of the 19th of April, 1856, so

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far as it was security to the plaintiff as such surety; and to the extent the defendant has been injured by the relinquishment by the plaintiff of that security without his assent—knowing as the plaintiff did at the time that the defendant was co-surety with him—aside from any question of pleading, it is a defense to the plaintiff's claim against him for contribution.

The equitable interest of the defendant in the mortgage, I think, only entitled him to have the proceeds of the mortgaged property, on a sale, applied ratably to all the debts and liabilities provided for, as well those to accrue as those then existing. The mortgage expressed that future liabilities were to be incurred by the plaintiff, and was in terms to be security for them; and no legal reason is perceived for a distinction between them and existing liabilities, as to the disposition of the avails of the property. (*Truscott v. King*, 2 *Selden*, 147.)

This view, as to the legal rule for the application of the proceeds of the property, will not affect the result of this case, as I am satisfied from the evidence that the property mortgaged was ample to pay all the debts and liabilities intended to be secured, including the future liabilities.

I think the answer sufficient to allow of the defense. The mortgage is set forth, and a claim to the benefit of it, in respect to the liability on the bond, asserted. Proof was given of the mortgage by the defendant, when the plaintiff showed he had canceled it. The defendant could not therefore have what he claimed, in terms, but he might have the same thing in substance, by this defense. No surprise can be pretended; there is no substantial difference between the relief sought and that obtained.

I think the judgment should be affirmed.

Judgment affirmed.

[MONROE GENERAL TERM, December 5, 1859. T. R. Strong, Welles and Johnson, Justices.]

## LAUER vs. BROWN.

The plaintiff, by a written agreement executed on the 9th of October, 1849, agreed to do the mason work, and furnish the materials for erecting a building for the defendant, which was to be completed, except a portion of the plastering, on or before the 20th of November then next; which time was subsequently extended ten days. The building was to be three stories in height; the defendant reserving the right to put on a fourth story, by paying a specified sum per thousand for the brick laid in the walls. *Held* that the defendant's right of election, in regard to the fourth story, could only be exercised while a reasonable time remained for adding another story and finishing the work, with the addition, by the time specified in the contract, or as extended; and that unless the defendant exercised his right of election within that time, he lost it.

*Held also*, that if, within that time, the defendant elected to have a fourth story, the plaintiff was bound to construct it, and perform all the work (except the plastering) by the 30th of November. That the time for completing the job was fixed in reference to all the work, including the fourth story, if that should be determined on.

**A** PPEAL from a judgment entered upon the report of a referee. The action was brought upon a written contract entered into between the parties on the 9th of October, 1849, in these words:

"An agreement between Frederick C. Lauer of the first part, and Jonah Brown of the second part, viz: The party of the first part agrees to do the mason work, and furnish the material requisite for the completing of a building according to the plans and drawings got up by H. Searl, and agreeable to the annexed specifications. The building to be located in the city of Rochester, south side Main street, and the east end of the building is to be put on the east line of lot No. 2, (two,) one half of the wall to be on lot No. 3, (three,) all of which is to be done, finished and completed on or before the 20th day of November next. And in consideration of which, the party of the second part agrees to pay to the party of the first part the sum of fifteen hundred twenty-six dollars and sixty-three cents. And it is further understood that the party of the second part reserves the right to put on a fourth story, agreeing with the plans and drawings of the building, or as

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shall be directed, by paying six dollars and fifty cents per thousand for brick laid in the walls. The sills and caps to be placed without further expense to the party of the second part. And it is further understood\* that the party of the second has the right to abate such portions of the plastering as he may direct, for which thirteen cents per yard, according to the rule of masonry, shall be deducted and allowed to the party of the second. And the party of the second part reserves the right to make alterations, by paying more if they cost more, and by paying less if they cost less. All directions for alterations to be in writing. Rochester, 1849.

The party of the second part is not in any way to be accountable for hindrance by the joiners. It is further understood that the plastering of the 2d and 3d stories of the building is to be done after the first day of December next, as the party of the second part may direct, should the plastering not be abated."

At or about the time this contract was executed, the time for the completion thereof was extended ten days, by a writing signed by the defendant. The plaintiff, in his complaint, alleged a performance of the stipulations of the contract, on his part, and claimed the sum of \$1526.63 as due to him from the defendant. He also alleged that after the making of the contract, the defendant required and directed him to put a fourth story upon the building; which the plaintiff accordingly did; he doing the mason work and furnishing the materials therefor; by reason of which the defendant became indebted to him in the further sum of \$339.80. There was also a common count for work and labor, materials found, &c. In a third count of the complaint, the plaintiff alleged, in general terms, a performance of the contract, on his part, a breach by the defendant, and claimed a balance due to the plaintiff of \$450, with interest from February 6, 1851, for which sum he demanded judgment. The defendant, in his answer, admitted the making of the contract between the parties, but denied that the plaintiff had performed the same,

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within the time, and according to the terms, force and provisions thereof. He denied that he was indebted to the plaintiff for work done under the contract, but alleged that he had paid him, on account of such work, about \$1500; and that he had paid him various other sums, and had other items of account against him, which he claimed to have allowed to him by way of payment, set off or recoupment. He also alleged and insisted that, by the terms of the contract, the plaintiff was bound to finish and complete the building erected by him on or before the 20th day of November, 1849; whereas the same was not completed until six months thereafter; by reason whereof the defendant lost the rent and use of the said building for the space of six months, and thereby and otherwise sustained damages to the amount of \$600 or thereabouts, which he claimed to recoup in this suit, and to have allowed to him thereon. Also that the said building so erected for him by the plaintiff, as stated in the complaint, was not done in a proper, skillful and workmanlike manner; but on the contrary, was done in so bad, unskillful, negligent and improper manner that he, the defendant, had sustained large damages thereby, to the amount, as he claimed, of \$1000, which he claimed to recoup in this suit, and would insist on the trial should be allowed to him. He also claimed damages sustained by him in consequence of the negligence of the plaintiff in leaving the cistern uncovered, and in not constructing it in a proper manner.

It appeared in evidence on the trial before the referee, that between the 1st and 20th of November, 1849, the defendant gave the plaintiff notice to put up a fourth story; that at that time the second and part of the third stories were up; that but for the fourth story the plaintiff would have completed the building by the 30th of November; that the wall of the fourth story was completed by or before the middle of December; that the plaintiff was delayed, by the joiners not putting in doors and windows, a month and a half; that they were not put in until January, 1850; that after the plastering was

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commenced, the defendant directed the work to be suspended until spring; that the defendant was present during the time the work was progressing, giving directions; he required the fourth story to be plastered before any of the others, and gave as a reason therefor that he could not rent the stores until spring; that the building was completed by the first of May, or soon thereafter.

On the part of the plaintiff it was claimed, on the trial, that the building would have been completed so far as it was to be done by him by the 30th November, (the time to which the completion was extended by written stipulation,) if the defendant had not ordered the building of the 4th story, and that such order absolved the plaintiff from his obligation to complete the work by the 30th November. On the part of the defendant, it was insisted, that the engagement on the part of the plaintiff to complete the work by 30th November was binding upon him, whether the fourth story was ordered or not. The referee adopted the plaintiff's construction of the contract; holding that the building which was to be completed by the 20th November, (enlarged to 30th,) was that which was first described in the contract, and for which the defendant was to pay \$1524.63. That when he elected to add the other story, it became a different building, with no express limitation as to the time of its completion; which of course left it to the legal rule that it should be done with reasonable diligence; and that in this view no evidence had been offered to show that the plaintiff was in any respect in default. The referee therefore refused to allow the defendant any thing for the loss of rent on the stores in consequence of their not being completed within the time fixed by the contract. He reported that there was due to the plaintiff, from the defendant, the sum of \$263.04. And from the judgment entered upon his report the defendant appealed.

*E. Griffin*, for the appellant.

*H. C. Ives*, for the respondent.

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*By the Court*, T. R. STRONG, J. We think the construction given by the referee to the contract, in regard to the time for the completion of the work, is erroneous. It is provided by the contract, that the work shall be done by the 20th of November, except some plastering, which was to be done after the 1st of December. The time was afterwards extended by parol to the 30th of November. The building was to be of three stories, with an election to the defendant to have a fourth story. It is supposed by the referee that, upon the defendant electing to have a fourth story, the contract became indefinite as to the period for finishing the job, in like manner as if no time had been specified in it. But we think this right of election could only be exercised while a reasonable time remained for adding a fourth story, and finishing the work with the addition by the time specified in the contract, or as extended. Unless exercised within that time, the defendant lost it. If within that time the defendant elected to have a fourth story, the plaintiff was bound to construct it, and perform all the work, except the plastering, by the 30th of November. The time for completing the job was fixed in reference to all the work, including the fourth story, if that should be determined upon.

Nevertheless, if the defendant assumed to elect to have a fourth story so late that there was not a reasonable time remaining to add that story, and have all the work done by the period named in the contract, or as extended, and yet the plaintiff acquiesced in the election, the circumstances may have been such as to warrant the finding, that the parties mutually waived the stipulation in the contract as to the time when the work should be done.

There is no finding in the case, nor does the evidence clearly show, when the defendant undertook to exercise his right of election, or whether or not within a reasonable time to allow of the completion of the whole work, except the plastering, by the 30th of November; nor is there any finding whether the provision in the contract as to that time was waived by

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the parties. The conclusions of fact of the referee in respect to these points should be given.

The report of the referee is not in accordance with the rule of the court as to stating the conclusions of law and fact separately, and the printed case is defective in the same particular. But under the arrangement made by counsel at the argument, we should not send the case back for that reason.

The error in the construction of the contract is a material one, and we think calls for a reversal of the judgment, and a new trial, with costs to abide the event.

Judgment accordingly.

[MONROE GENERAL TERM, December 5, 1859. *T. R. Strong, Welles and Johnson*, Justices.

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THE BRIDGEPORT CITY BANK *vs.* THE EMPIRE STONE  
DRESSING COMPANY.

A corporation cannot become surety, either as an accommodation indorser, or in any other form; unless the note has been discounted in good faith, in consequence of representations made by its proper officers that it was the note of the corporation; or unless the note has passed into the hands of a bona fide holder without notice, who has paid a valuable consideration for it.

Where, in an action against a corporation, as indorser of a promissory note, there was conflicting evidence upon the questions whether the indorsement was for the accommodation of a third party, or whether the note was discounted by the plaintiff for the benefit of the defendant; and if it was an accommodation indorsement, whether the note was discounted by the plaintiff in consequence of representations made by the proper officers of the defendant that it was their own note, received by them in the ordinary course of business; *Held*, that those questions should have been submitted to the jury; and that it was erroneous for the judge himself to decide that the plaintiff discounted the note so as to become a bona fide holder, and to direct the jury to find a verdict for the plaintiff.

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**M**OTION, upon a case and exceptions, for a new trial. The plaintiff is a banking corporation, created by the legislature of Connecticut, and is located at Hartford in said state. The defendant is a corporation, organized under the general manufacturing law of the state of New York. The defendant's secretary was authorized, by by-law, to indorse and accept notes and bills of exchange *in the prosecution of its business*. On the 11th February, 1854, at the city of New York, William J. Flagg made his promissory note in writing, bearing date on that day, for \$6292.38, payable eight months after date, to the order of the North American Stone Dressing Company, a Connecticut corporation, of which Chas. T. Shelton was treasurer. Shelton indorsed the note in the name of the latter company. On the 16th May, 1854, he procured it to be indorsed in the name of the defendant by the defendant's secretary, George Sherman; indorsed it again in his own name; and on the 19th June, 1854, transferred it, thus indorsed, to the plaintiff; receiving, as the consideration of such transfer, a protested note of one John T. Bruen, which had previously been charged to his account, amounting, with protest fee, to \$2925.83. The balance, \$2978.43, (a discount of \$390.12 having been reserved,) was passed to his credit, upon an agreement that the same should not be required of him till the plaintiff *got ready*, a contingency which does not appear to have ever arisen. The note was protested for non-payment at maturity, and was *subsequently* taken up by Shelton, and *again* left with the plaintiff by him as collateral security for the payment of certain other notes, as would appear from the written agreement between him and the plaintiff. There was evidence tending to show that the indorsement by Sherman of the note in the defendant's name, was not made "in the prosecution of the defendant's business," but was solely for Shelton's accommodation; and that the defendant never received any benefit from, or consideration for, such indorsement. The judge charged, that the plaintiff discounted the note so as to become the *bona fide* holder, and that upon

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the whole evidence the plaintiff was entitled to recover the full amount claimed, after crediting a certain \$600 note which had been paid to the bank; and directed the jury to find a verdict for the plaintiff, which they accordingly did, for the sum of \$7138.02.

*W. M. Evarts*, for the defendant.

*H. & C. S. Andrews*, for the plaintiff.

*By the Court*, CLERKE, J. Whether a corporation can become surety, either as accommodation indorser, or in any other form, we supposed was, beyond all question, firmly established in the negative. We had occasion to discuss and decide this question, little more than a year ago, at the general term of this district. The decision is reported in the 26th *Barbour*, 568, in the case of *Morford v. The Farmers' Bank of Saratoga*. It is expressly stated in the opinion in that case, that a banking or other corporation is not authorized to make an accommodation indorsement; and it is not binding, unless it appears that the note has been discounted in good faith by the party suing on it, in consequence of a representation made by the bank that it was its own note. This, in fact, was only a reiteration of the opinion of the court of appeals, in *The Bank of Genesee v. The Patchin Bank*, (3 *Kernan*, 309.) The language of the court in that opinion is: "It is quite clear that the officers of a banking association, or other corporation, have no power to engage the institution as the surety for another. Such a transaction is without the scope of the business of the company." And again: "But if the proper officers of the defendant have negotiated it to the plaintiff, representing it to be a bill belonging to their bank, and upon the faith of that representation the plaintiff has in the usual course of its business discounted it, advancing to the defendant the proceeds, the defendant is precluded, upon the principle just referred to, (the principle of estop-

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pel,) from setting up that it was indorsed without authority." The principle indeed is also recognized in that opinion, that a negotiable security of a corporation, which, upon its face, appears to have been duly issued by the corporation, is valid in the hands of a *bona fide* holder without notice, although in fact it was issued for a purpose, and at a place, not authorized by its charter.

The decision of the court of appeals, in *The Farmers and Mechanics' Bank v. The Butchers and Drovers' Bank*, (16 *N. Y. Rep.* 125,) is not in conflict with these principles; but, on the contrary, is in complete accordance with them. The real question in that case was, whether the principal is estopped by the representation of the agent from disputing facts which show that the act was authorized. In that case, the defendant's teller had certified that the drawer of a check had funds in their bank to pay the check. While it was admitted that a principal is not bound by an unauthorized act of the agent, it was held that, although the teller had no authority to certify without funds, there was a plain distinction between the terms of a power and facts entirely extraneous, upon which the right to exercise the authority conferred, may depend. "One who deals with an agent has no right to confide in the representation of the agent as to *the extent of his powers*. If, therefore, a person knowing that the bank has no funds of the drawer, should take a certified check upon the representation of the cashier, or other officer by whom the certificate was made, that he was authorized to certify without funds, the bank would not be liable." But in regard to the extrinsic fact, whether the bank had funds or not, it was held that the bank was estopped from denying the representations of its agent. The teller, *by certifying the check*, virtually declared the extrinsic fact that the drawer had funds in the bank; and it was held, that the bank was estopped from disputing this declaration. It is expressly held in that case, however, that if the holders of the check knew that the representations of the teller were false, they would not be deemed innocent hold-

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ers; much less does it contradict the principle that a corporation cannot become surety, either as an accommodation indorser, or in any other form, unless the note has been discounted in good faith, in consequence of representations made by its proper officers that it was their own note, (the note of the corporation,) or unless it has passed into the hands of a *bona fide* holder without notice, who has paid valuable consideration for it.

In the case under consideration, the main questions, besides that relating to the notice of protest, arising from the principles to which I have referred, were whether the indorsement on the note in suit was for the accommodation of a third party, or whether it was discounted by the plaintiff for the benefit of the defendant; and secondly, if really an accommodation indorsement, was it discounted by the plaintiff, in consequence of representations made by the proper officers of the defendant, that it was their own note, received by them in the ordinary course of business. There was conflicting evidence on these points; but the judge left nothing for the jury to decide, he himself deciding that the plaintiff discounted the note so as to become the *bona fide* holder, and directing the jury to find a verdict for the plaintiff. This, without any consideration of the other points presented on the argument, is sufficient to induce us to set aside the verdict, and to order a new trial; costs to abide the event.

[NEW YORK GENERAL TERM, November 7, 1859. *Roosevelt, Clerke and Sutherland*, Justices.]

## ASHLEY vs. MARSHALL.

The plaintiff brought his action to recover damages against the defendant, for entering the plaintiff's premises and taking possession of certain personal property; and he obtained an injunction, to restrain the defendant from meddling with the property. He then sold the goods himself, and received the avails. The defendant claimed the property as mortgagee, by virtue of a mortgage executed by one S., and alleged in his answer, that being prevented by the injunction, from removing and disposing of the property, he lost his debt against S. On the trial the defendant proved that a portion of the goods belonged to him, and he recovered a judgment against the plaintiff, for the conversion thereof, for a sum over \$50. *Held* that from the form of the action, and the mode of procedure which the plaintiff had adopted, the defendant must be considered the successful party, and was therefore entitled to costs.

**A** PPEAL from a judgment entered upon the report of a referee. The action was brought to prevent the defendant, Marshall, from interfering with certain articles of personal property, and to recover damages for having so interfered therewith, and for entering, by force, and closing up the plaintiff's premises, and destroying his trade and business, the plaintiff claiming damages therefor. The court did interfere by preliminary injunction, and forbade the defendant to interfere with the property. The defendant Marshall, by his answer, claimed the property in virtue of a mortgage executed to him by the defendant Steckel, and claimed the right to enter said premises, and take possession thereof. The referee found the property in question, claimed by the defendant Marshall, under the mortgage, to be the property of the plaintiff, and that the mortgage was void, that the entry was unlawful, and that the trespasses complained of had been committed. The referee also found, that some weeks or months after this suit was commenced, the plaintiff sold the property in question at auction, and that among the same were some articles which had formerly belonged to the defendant Steckel, and which had passed to the defendant Marshall, under the mortgage above referred to. The referee found the value of this property, and reported in favor of the defendant Marshall, for such value, \$131.28,

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with costs of this action. The plaintiff excepted to the report, and appealed from the judgment entered thereon.

*By the Court, CLERKE, J.* This action was commenced to recover damages against the defendant for forcibly entering the premises of the plaintiff and taking possession of the plaintiff's personal property, situated there, consisting, principally, of furniture. On the commencement of the action the plaintiff obtained an injunction to restrain the defendant from taking possession of, selling, removing, or in any manner interfering with this personal property. The defendant, in his answer, claims this property by virtue of a mortgage, executed to him on the 13th November, 1855, by one Steckel, who was then in possession of the premises, and of the personal property in question. He also sets up that pursuant to the authority contained in the mortgage, he had a right to take possession of the personal property; but that after he had taken possession of it, and when he was about to remove and dispose of it, he was prevented from doing so by reason of the injunction, and consequently lost the debt and suffered damage to the amount of his claim against Steckel. He also denies every material allegation in the complaint. It appears from the testimony before the referee, to whom the issues were referred, that at the commencement of the action most of the furniture mentioned in the complaint belonged to the plaintiff; that he was the assignee of an unexpired term of a leasehold interest in the premises, which were used as a hotel; that Steckel was in possession by permission of one Doolittle, whom the plaintiff allowed to occupy it; that Steckel kept it, consequently, as landlord, from the 1st of May, 1855, until the month of May, 1856; and that having purchased furniture for the use of the hotel from the defendant Marshall, he gave the latter the mortgage above mentioned, on all the furniture there, including the articles which he had purchased from Marshall. The mortgage having become forfeited, Marshall went to the hotel, took possession of all the furniture, and forcibly nailed

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up the doors of the rooms in which it was contained, and caused it to be advertised for sale. The plaintiff, however, as soon as he obtained the injunction, took possession of the furniture, and sold it all at auction. The referee of course allowed nothing to the plaintiff for his furniture, as he had already recovered possession of it, but allowed him \$25 for the intrusion of Marshall into the hotel; and he gave to the latter a judgment for \$138.87 with interest, against the plaintiff, as damages, on account of the conversion by the plaintiff of Marshall's share of the furniture.

If the defendant had set up in his answer a claim for this portion of the furniture, there could be no doubt that the referee would have been justified in allowing him this amount, or whatever it was worth. But, was this necessary? The plaintiff claimed the whole, and the defendant claimed the whole; and in claiming the whole he of course claimed the part, to which the referee found he was entitled. No separate claim or counter-claim for a part seems to me, therefore, necessary. Both parties claimed too much; the plaintiff failed to recover what he demanded, and having obtained possession of the whole and sold it, he was clearly accountable to the defendant for the value of that portion of it which belonged to the latter. If the plaintiff claimed only as much as it was proved he was entitled to, and the defendant at the trial endeavored to prove that the plaintiff, during the same transaction, took possession and disposed of other property not included in the complaint, belonging to the defendant, it would not be proper to allow such a defense without a formal counter-claim set up in the answer. But, in claiming the whole, he does in effect set up a counter-claim to the part which he proved belonged to him. It is a claim, counter or contrary to the claim of the plaintiff, who demanded the whole, but was only entitled to a part; the other part belonging to the defendant.

As to the mere claim for damages arising from the injunction, it would not have been proper for the referee to have

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passed upon it. Nor does he appear to have done so. He considered that the defendant had established his right to a portion of the property in question, and gave him a judgment accordingly. It seems severe, that the plaintiff, who had a good cause of action for an amount exceeding the sum that the defendant proved himself entitled to, should be compelled to pay the whole costs of the action to the defendant. If the defendant had kept possession of the whole and sold it, the plaintiff's share of the proceeds over and above what the defendant was entitled to, would have been sufficient to carry costs. But from the form of the action, and the mode of procedure which the plaintiff has adopted, costs must, I think, be awarded to the defendant as the successful party. This is an ordinary common law action for damages; to be sure, an injunction is prayed for; but this, even if entirely proper to grant it, under the circumstances disclosed in the complaint, does not make it an equity suit. I regard the whole procedure of the plaintiff as anomalous and unfortunate. It was totally unnecessary for him to commence the action in the form which he selected. If he commenced an action for the claim and delivery of the goods under chapter two of the code, and the sheriff delivered them to him under the ordinary process for the recovery of specific personal property, and if he established his claim at the trial, still he would be entitled to the costs of the action, although he had obtained possession of the property. And this would have been quite as effectual a remedy, to say the least, as an injunction. Not having done this, but having prosecuted an action for damages, in which his adversary is, in effect, the successful party, costs follow for the defendant as a matter of course.

The judgment should be affirmed, but without costs of the appeal.

[NEW YORK GENERAL TERM, November 7, 1859. *Roosevelt, Clerke and Sutherland*, Justices.]

ATKINSON *vs.* COLLINS.

Where a party sues for work and labor done and performed, if there is a special contract between him and the defendant, not completed or executed as to its terms, the plaintiff should state it, or refer to it, in his complaint. If he fails to do so, the defendant may set it up and urge it in his defense.

If, in an action for work and labor, generally, it appears that there was a special contract, which has not been completed or executed, the plaintiff cannot recover for the work comprised within the special agreement.

In such a case, the plaintiff should set out the special agreement, and allege a partial performance.

**M**OTION to set aside a verdict, on a case and exceptions, ordered to be heard at a general term.

*Wm. R. Stafford*, for the plaintiff.

*A. R. Dyett*, for the defendant.

*By the Court*, CLERKE, J. This action was brought to recover for work and labor performed by the plaintiff for the defendant, in painting ward school house No. 34, in the city of New York. The defendant had made a contract with the school officers of the 13th ward, to furnish and provide all the carpenter's work and materials for the erection and completion of four wings, and other alterations inside of the main building of said school, including painting and other work; and it was in consequence of this contract that the defendant employed the plaintiff as a sub-contractor for a portion of the work.

The defense set up was, that the work was done under a special contract, and that the work had never been accepted by the superintendent of school buildings, or by the school officers of the ward. There was a claim for extra work, for which the jury rendered a verdict; but for the work, referred to in the contract between the plaintiff and defendant, nothing was allowed; the judge deciding that the only question of fact he should submit to the jury was, as to the extra

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work. The general rule is, that evidence of services, performed under a special agreement, will not sustain a general count for work, labor and services; but where the terms of a special agreement are consummated—in other words, where it is what the law calls *executed*—an obligation arises, for which what was formerly known as a general *indebitatus assumpsit* will lie: that is, where the contract is executed, it would not have been necessary to declare specially on the contract, but the plaintiff may declare, generally, for whatever was alleged to be due for the work, labor and services, without any reference to the contract. Whether this rule applies now—whether, even if the terms of the contract are completed, the plaintiff can allege a general demand without any reference to the contract—is very questionable. The code, which is, generally, deemed to have relaxed the rules of pleading, requires, in many instances, a strictness unknown to pleading in its degenerate days, its precision neutralized by the “general issue,” and the other laxities existing at the time of the introduction of the code. For example, the code (§ 142) requires that the complaint shall contain a *plain and concise statement of the facts, constituting a cause of action*. Now, where there is an agreement to perform certain work, whether the terms of that agreement have been completed or not, it would seem that the agreement is one of the essential facts *constituting the cause of action*, and should, it may with great plausibility be urged, be contained, in all cases, in the complaint. But it is probably unnecessary to discuss this question at present. We shall consider this case, as if the code had not introduced a rule stricter than that which prevailed under the old system.

If, then, there was a special contract between the plaintiff and defendant, and if it was not completed or executed as to its terms, the plaintiff, according to the rule under that system, ought to have stated it or referred to it in his complaint; and not having done so, the defendant had a right to set it up, and to urge it in his defense. It is not denied, that a

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special contract had been duly executed between the plaintiff and defendant, and that it provided, when the graining was done, the plaintiff should receive \$165, (one half,) and when the whole was completed *and accepted by the superintendent of school buildings and the school officers of the 13th ward*, the plaintiff should receive the remaining \$165.

It was very important to the defendant that the agreement should contain this provision or condition, because his agreement with the school officers contained one precisely identical; so that, until the superintendent of school buildings and the school officers accepted the work, the defendant would not be in funds to pay his sub-contractors. The evidence clearly shows that the work performed by the plaintiff for the defendant never was accepted by those authorities, and that consequently the terms of the agreement were not completed or executed. The plaintiff, then, was properly nonsuited as to the work comprised within the contract; the judge having refused to submit any question in relation to that work to the jury, on the ground that the complaint did not refer to it.

If indeed the complaint alleged the contract, there might have been a question of fact for the jury; and that question would be, did the superintendent of school buildings and the school officers accept the work?

But, under the pleadings in the action, the judge was right in not submitting that question to them, and in effect dismissing the complaint, as to the work under the contract.

The judgment should be affirmed, with costs.

[NEW YORK GENERAL TERM, November 7, 1859. *Roosevelt, Clarke and Sutherland*, Justices.]

BEACH, administratrix, &c. *vs.* THE BAY STATE STEAMBOAT  
COMPANY.

The statutes of New York, passed in 1847 and 1849, giving an action for damages, to the families of persons killed by the wrongful act, neglect or default of others, were intended to regulate the conduct of corporations, their agents, engineers, &c., and of other persons, whilst operating or being in this state, only. If a citizen of this state leaves it, and goes into another state, he is left to the protection of the law of the latter state.

An action will not lie, in the courts of this state, under those statutes, for a wrongful act or omission, occurring out of this state and within the bounds of another state, by which a death is caused. CLERKE, J., dissented.

**A**PPEAL from an order made at a special term, overruling a demurrer to the complaint. The action was brought under the acts of 1847 and 1849, to recover damages resulting from the death of John C. Beach, caused by an explosion or escape of steam on board the defendant's steamboat, the Empire State, while on her passage from Fall River to the city of New York, the said John C. Beach being a passenger on board of said boat. The complaint alleges that the said John C. Beach was at the time a resident of the city of New York; that the defendant is a corporation of Massachusetts; that the deceased paid his fare and took passage at Fall River for New York; and that the explosion or escape of steam which caused the death, took place through the wrongful act, neglect and default of the defendant and its agents and servants. The defendant demurred to the complaint, substantially upon the ground that it is not alleged in the complaint, nor does it appear therefrom, that the act or acts complained of occurred within the state of New York.

The judge at special term, in deciding the demurrer, assumed that the death and disaster occasioning it, did not take place within the state of New York; he nevertheless held that the action was well brought, and overruled the demurrer. (*See* 27 Barb. 248; 16 How. Pr. R. 1.)

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*Daniel Lord*, for the appellant.

*T. H. Rodman*, for the respondent.

SUTHERLAND, J. I think it is to be assumed, in deciding whether the demurrer is well taken, as was done by the judge at special term, that the explosion and death did not occur within the state of New York. If the place is material, and the pleading is ambiguous as to the place, the presumption should be against the party whose pleading it is. (*Cruger v. Hudson River R. R. Co.*, 2 Kern. 201.)

It necessarily results from the independent sovereignty of different states or nations, that the laws of one state or nation can have no force or effect without its own territorial limits, and within the territory of another state or nation, without the consent of the latter. Sovereignty is exclusive and absolute, except so far as it may be qualified by treaty or consent. If the legislature of two states or nations could pass laws for each other, to be enforced, *proprio vigore*, within the territorial limits of each other, both nations would instantly cease to be sovereign. The passage of laws is the highest act of sovereignty. Each independent nation or country has the same right to pass laws. It necessarily follows that the laws of a state or country "can have no intrinsic force, *proprio vigore*, except within the territorial limits and jurisdiction of that country." (*Story's Conf. Laws*, §§ 7, 8.) In the United States, the sovereignty of the several states is modified by the constitution of the United States adopted by them; but irrespective of the constitution of the United States, the several states are independent sovereignties with respect to each other and other countries, and the foregoing principle of the territorial limitation of legislative power or jurisdiction applies to them.

The well known distinction between the *lex loci contractus*, and the *lex fori*, and between transitory and local actions, taken and recognized in construing and enforcing laws, as-

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sumes and is founded on this state or national territorial legislative limitation. (4 Cowen, 510, note.) Personal injuries or torts are transitory, *et sequentur forum rei*. (*Rafael v. Develst*, 2 W. Black. R. 1058. *Mostyn v. Fabrigas*, Cowp. R. 161, 176.)

A party who has suffered a personal injury or tort in another country or state and comes here, brings with him his cause of action for the injury or tort, and if he finds the party who committed the injury or tort in such other country or state here, can sue him here ; but it is presumed that in ordinary cases he can do so only upon the ground that he brought his cause of action with him ; that is, that the act or acts of the defendant, by which the injury or wrong was effected, were unlawful when and where committed ; in other words, that the injury or tort complained of here, was an injury or tort by the law of the country or state when and where committed.

In such cases, the courts of one country or state give a remedy, upon the principle of comity, for personal injuries and wrongs suffered in another ; but they must be injuries or wrongs by the law of the state or country in which they were suffered.

The common law gives a remedy for personal injuries or torts, whether direct or consequential. In actions brought here for injuries or torts committed in another country or state, where the common law is presumed to prevail, the court here gives the common law remedies for such injuries and torts, upon the presumption that the common law does prevail in such other country or state, and, therefore, that the plaintiff had a right of action or remedy there, for the injury or tort committed there.

To apply this principle to this case, if the explosion took place in the state of Massachusetts, and John C. Beach, the deceased, had survived the injuries, and had brought his action here, against any of the defendant's agents or servants, through whose default or neglect the explosion occurred, whom

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he could find here, he could have recovered here, upon the presumption that the common law does prevail in Massachusetts, and because, the common law prevailing in Massachusetts, he could have recovered there, had the action been brought there. But John C. Beach did not survive the injuries; and this action is brought by his personal representative, under special acts of the legislature of this state, giving a right of action or remedy unknown to the common law, not for the injuries suffered by John C. Beach, but for the damages and pecuniary injuries resulting from his death, suffered by his widow and next of kin; damages and injuries not the subject of judicial cognizance or of legal redress by the common law, and for which, therefore, it is to be presumed, no action could be brought in Massachusetts.

It is quite immaterial whether those sections of the acts giving this right of action, are penal or remedial. The remedy, in fact, is an extraordinary one, unknown to the common law, created by the acts, for damages or injuries also created by the acts; for, in a legal or judicial sense, damages or injuries for which there is no legal redress or remedy, are not damages or injuries. These acts which create the remedy for the benefit of the widow and next of kin, *also create the wrong as to them.*

Assuming that the wrongful act, neglect or default, explosion and death, took place in Massachusetts, in the absence of any law of that state giving a remedy to the widow and next of kin, or for their benefit, in a legal sense they cannot be said to have suffered any wrong or injury from the act, neglect or default, &c., unless the acts of this state, under which this action is brought, extended into and were in force in Massachusetts; for an act or acts complained of as tortious or wrongful, must be tortious and wrongful when and where committed. At all events, neither the return of the agents or servants of the defendant, through whose neglect or carelessness the explosion took place, into this state, nor the voluntary appearance of the defendant in this action, would make the act or acts committed in Massachusetts originally tortious,

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or give the widow and next of kin of the deceased the benefit of the remedy provided for by the acts of 1847 and 1849.

The learned judge who decided this demurrer at special term, commences his opinion by saying, "It cannot be denied that one state or nation has a right to give its citizens redress for any personal injury committed without as well as within its territorial limits, when it obtains jurisdiction over the wrongdoer. This has always been recognized in the common law. Many, if not most of the actions instituted in our courts of justice, are transitory and not local; and if the cause upon which any one of them is founded, arose in Japan, it would be just as tenable as if it arose in the state of New York."

I think the question raised by the demurrer in this case is not a question of legislative power, but a question of interpretation. It is not a question as to the power of the legislature which passed the acts of 1847 and 1849, but as to the intent of the legislature in passing them. The question is not whether the court has jurisdiction of the parties and of the cause of action, assuming the action to be for an injury or tort committed in Massachusetts, or without the political jurisdiction of the state; but the question is, whether the act or acts complained of, which caused the death of John C. Beach, and thus consequentially the alleged damages for which the action is brought, were tortious by *these acts of the legislature of this state*, and did or could, in a legal sense, cause any damage or injury *to the widow and next of kin*, for which an action can be brought, *under these acts of the legislature of this state*, assuming that the act or acts, negligence or default complained of as causing the death of John C. Beach, were committed or occurred in Massachusetts, or out of this state, and within the jurisdiction of another state. In other words, I think the question raised by the demurrer is, whether it appears from the complaint that the plaintiff has a cause of action under the acts of 1847 and 1849; not whether the legislature of this state could have given him one; or, if he has one, whether the court has jurisdiction of it.

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Now it is very clear that the general proposition stated in the opinion of the learned judge at special term, that a state or nation has a right to give its citizens redress for injuries committed without as well as within its territorial jurisdiction, where it obtains jurisdiction over the wrongdoer, however true, has little or no bearing on the question in this case, viewing that question as one merely of the interpretation of the acts of 1847 and 1849. Indeed, the learned judge by stating that proposition and the other immediately following it as to transitory actions, as bearing on the question in this case, would appear at the very commencement of his opinion to have assumed, that the act or acts, negligence or default, complained of, as causing consequentially the injury and damages to the widow and next of kin for which the action is brought, were tortious and did cause such injury and damages, under and by force of these special acts of the legislature of New York; the very question in the case being, as I have before stated, whether the act or acts, &c., having been committed out of this state and within another state, were or could be tortious under and by force of these statutes of New York, or did or could cause any injury or damage to the widow and next of kin, for which a remedy was intended to be given by these statutes.

“Every nation has an exclusive right to regulate persons and things within its own territory.” (*Story's Confl. Laws, sec. 22.*)

Irrespective of written constitutions, and of limitations which may be implied from the formation and frame of the government, the legislature of a state may be said to have sovereign power over persons and things within its territory. It would have the power of preventing foreigners who had committed certain acts in their own country from coming into the state. It would have power to prevent citizens of the state who had committed certain prohibited acts in another country from returning to the state.

If the legislature of this state should do so extraordinary a thing, as to pass a law giving the personal representatives of

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an Englishman or of a Frenchman who had been killed in a duel in his own country, a right of action here against the party killing him, for damages for the benefit of the widow and next of kin of the deceased, such law could of course only be enforced against the person or property of the person committing the act, if he should happen to come into the state or have property here; but if the party committing the act should choose to come into this state, and should be sued under the act, it would be difficult to say that the case would necessarily present a question of jurisdiction for the court.

Laws of this description, undertaking in a certain way to regulate the conduct of foreigners in their own country, under the penalty of being enforced on their coming into the country passing the laws, might present questions of war, but could not very well present questions of jurisdiction.

A nation may undertake to regulate by law the conduct of its citizens while abroad in another country, to be enforced on their return to their own country, but such laws are really consistent with the almost self-evident proposition, that the laws of one nation or state can have no force in the territory of another, without the consent of the latter. As a state or nation "has an exclusive right to regulate persons and things within its own territory" only, it is to be presumed, whatever power it may have to regulate the property and conduct of its citizens in the territory of another state or nation with the consent of the latter, or to be enforced only on persons and property within its own jurisdiction, that its laws are and were intended to be regulations for person and things within its own territory only.

There is nothing in these acts of 1847 and 1849 which shows that they were intended to protect the lives of its citizens while out of the state—nothing to show that they were intended to extend to act or acts, neglects or defaults, committed or suffered in another state. It must be presumed, I think, as the result of the general principle of the territorial limit of political jurisdiction and of the force of laws before adverted to, that

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these statutes were intended to regulate the conduct of corporations, their agents, engineers, &c., and of other persons, whilst operating or being in this state only. If a citizen of this state leaves it, and goes into another state, he is left to the protection of the law of the latter state.

One section of the law of 1849 is highly penal. For the same wrongful act, neglect or default, for which the statutes give the civil remedy to the personal representatives of the deceased for the benefit of his widow and next of kin, the statute of 1849 renders the party who commits the act, &c. liable to indictment and imprisonment in a state prison. Penal actions and proceedings are strictly local. Can it be presumed that the legislature intended, for the purposes of the civil remedy, to include act or acts, neglects or defaults, not intended to be the subjects of the criminal proceeding?

Upon the whole, it is quite clear to me that it was not intended by these statutes to make the act or acts, neglect or default, complained of in this case, which it must be assumed occurred out of this state and within the jurisdiction of another state, the subject of the civil remedy given by the statutes; that therefore the complaint in this case does not show any cause of action under these statutes; that the judgment at special term should be reversed; and that the defendant should have judgment on the demurrer.

ROOSEVELT, J., concurred.

CLERKE, J., dissented, for the reasons given by him in his opinion, at the special term.

Judgment reversed.

[NEW YORK GENERAL TERM, November 7, 1859. *Roosevelt, Clarke and Sutherland*, Justices.]

WILLIAM E. SIBELL, assignee, &c. *vs.* GEORGE REMSEN,  
Sheriff, &c.

Where an action is brought by a party as assignee, under an assignment made by a debtor, for the benefit of creditors, and the answer denies the right of the plaintiff to bring the action as such assignee; and the court decides that the assignment was void, and that no title to the property passed to the plaintiff under the same; and thus determines that the action was not brought by the plaintiff as assignee or trustee of an express trust, he cannot claim exemption from costs on the ground that he was such. CLERKE, J., dissented.

**A** PPEAL from an order made by a judge, at chambers, denying a motion made by the plaintiff, to vacate an order theretofore made, in this action, requiring the plaintiff to appear and make a discovery on oath concerning his property.

*S. Sanxay*, for the appellant.

*N. F. Waring*, for the respondent.

SUTHERLAND, J. This action was brought by Sibell, as assignee of an association or corporation called the Forest and Agricultural Steam Engine Company, under a general assignment of its property and effects, alleged to have been made to him by that association or corporation, for the benefit of its creditors. The answer denies the right of the plaintiff to bring the action as such assignee; and alleges, if any such assignment was made, that it was and is not valid, and that by virtue thereof the plaintiff cannot maintain the action.

The judge before whom the cause was tried held that the assignment was void, and that no title to the property of the association or corporation ever passed to the plaintiff by the assignment, and dismissed the complaint. It having been thus determined that the action was not in fact brought by the plaintiff as assignee or trustee of an express trust, he cannot claim the exemption from costs, given to the trustee of an express trust by § 317 of the code.

This judicial determination that the plaintiff did not in

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fact prosecute this action as the trustee of an express trust, must control us in deciding this appeal from the order made by Judge Davies.

I think the plaintiff took upon himself the risk of having his right to prosecute as assignee or trustee, denied and determined against him.

It is not a question of good faith, in bringing the action as trustee; but a question of fact, whether the action was prosecuted by the trustee of an express trust. I think the order appealed from should be affirmed, with costs.

ROOSEVELT, J. The issue in this cause was, whether the plaintiff was a trustee or not. It was found that he was not. He cannot, therefore, in this cause, claim exemption from costs, on the ground that he was.

CLERKE, J., (dissenting.) In this case the plaintiff sued as assignee under a voluntary assignment in trust, executed by an association called the Forest and Agricultural Steam Engine Company, created under general acts of the legislature of this state. The action was commenced to recover damages, for levying on property, included in the trust, under an execution against the company, issued some time after the execution and delivery of the assignment. At the trial, the complaint was dismissed on the ground that the assignment was totally void; and judgment was entered, in general terms, for the defendant's costs. An execution having been issued against the plaintiff for those costs, and returned unsatisfied, he was cited to appear before a judge, under supplementary proceedings, to be examined concerning his property. A motion having been made before the judge to set aside the order, on the ground that a trustee is not personally liable for costs, it was denied, and from this decision the plaintiff appeals.

Whatever was the law formerly on this subject, the code (§ 317) expressly provides "that in an action prosecuted or defended by an executor, administrator, trustee of an express

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trust, or a person expressly authorized by statute," costs shall be chargeable only upon or collected of the estate, fund, or party represented, unless the court shall direct the same to be paid by the plaintiff or defendant personally, for *mismanagement* or *bad faith* in such action or defense.

The plaintiff in this case is the assignee of an express trust, and although his complaint was dismissed on the ground that the assignment was void, yet nothing appears to show any bad faith on his part, in prosecuting the action. To be sure, it is maintained that, as the assignment was held void by the judge who tried the action, the plaintiff therefore was not a trustee at all, and sued without any right to maintain the action. But was he not a trustee until the instrument was declared void? Deeming himself a trustee under an instrument regularly executed, and, for all that we can see, considering it not only his right, but his duty to resort to this method of claiming the property entrusted to him, he commenced this action. If, indeed, he assumed to act as trustee without any color of authority, he would then be personally liable for costs, even without any express direction of the court; as, if he undertook the trust upon the mere oral request of the president of the company, or under an instrument not executed in the manner in which instruments of this nature must be executed, to make them the act of the corporation. In such case, the instrument would be a palpable nullity, and any acts which he performed under it would be without any color of authority. But in the case before us, as far as we can see, there was an instrument, legally executed, appointing the plaintiff trustee, and his acts may be compared to those of a person acting as a public officer, who has no proper title to the office, but whose acts have a certain efficacy. He is exercising legal authority, *de facto*; and he would have a right to claim and recover, in some instances, in his own name, property belonging to the interests which he represents. In this case, doubtless, the assignment was an essential chain of his title, and as it was pronounced void, he could not of course

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maintain his action. But, nevertheless, it was not an absolute nullity, so as to deprive him of all excuse for acting as a trustee, and instituting an action for damages done to property which he believed belonged to the trust. I therefore think that the plaintiff ought not to be made liable for costs, without the express direction of the court, on the ground of mismanagement and bad faith.

The order appealed from should be set aside, but without costs.

Order affirmed.

[NEW YORK GENERAL TERM, November 7, 1859. *Roosevelt, Clerks and Sutherland, Justices.*]

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JOHN P. TREADWELL and others *vs.* MYNDERT VAN SCHAICK and others.

The Croton aqueduct board has full power under the statutes, and the ordinances of the common council, to make special charges, or fix extra rates, to be paid for the use of the water, varying in each case, according to the quantity used; and to regulate the terms on which extra allowances shall be made, and the conditions on which the water shall be used.

The board has a right to make every such arrangement, respecting an extra supply of water, a matter of agreement, subject to such terms and conditions as it shall deem necessary to impose.

The proper construction of the 27th section of the act of 1849, establishing the board, is that the legislature intended the water should not be furnished to those who would not pay for it; and that the power should exist, in the board, to withhold the supply, if the terms on which the supply was furnished were not complied with.

The board therefore has power to cut off the supply of water, for non-payment of the water-rate; whether it be the regular rents, apportioned by the size, character and use of the building, or the extra rents chargeable, in addition to the regular rents, upon buildings which consume an extra quantity of water.

THIS was an appeal, by the plaintiffs, from an order made at a special term, dissolving an injunction, and dismissing the plaintiffs' complaint, with costs. The court found among

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other facts, the following: That the plaintiffs' hotel and wash house used and consumed during the water year 1855, from May 1st, 1855, to May 1st, 1856, 36,072,744 gallons of Croton water; that the defendants, under the laws of the state and the ordinances of the city, as the officers and agents of the corporation, charged the plaintiffs one cent per 100 gallons for the water so used, and that the charge so made amounted in the aggregate to the sum of \$3606.26. That they notified the plaintiffs, on or about the 18th January, 1856, that unless they immediately paid that sum, the defendants would cut off the Croton water from their hotel. That the plaintiffs' hotel has in water closets, baths, wash-hand basins, and otherwise, the number of 800 faucets, or taps, or discharge pipes, and that it accommodates 1000 lodgers; that there is in use in the hotel one steam engine supplied with Croton water, and used in part in forcing Croton water to the top of the hotel, into tanks, to supply the stories of said hotel above the second; that there is a bar room attached to said hotel; that the water used at the Astor House is measured by the same kind of meters, and charged for at the same rate, as that used at the plaintiffs' hotel; that the Croton water supplied to all the large hotels and manufactories in the city, to the number of 80, is measured by the same kind of meters used in the plaintiffs' hotel. To these findings of facts no exceptions were taken by the plaintiffs.

It also appeared in evidence that the Croton aqueduct department had established the following "Rules, regulations and penalties," which were printed on the back of each permit issued, for the use of the water:

"1. No tenant will be allowed to supply water to other persons or families for other than domestic purposes; if found doing so, the supply will be stopped, and the amount of payment forfeited.

2. No addition or alteration whatever, in or about any conduit, pipe or water-cock, shall be made or caused to be made,

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by persons taking the water, without notice thereof being previously given to, and permission had in writing from, the board.

3. All persons taking the water, shall keep their own service-pipes, stop-cocks and apparatus in good repair, and protected from frost at their own expense, *and shall prevent all unnecessary waste of water.*

4. *Street-washers* shall be used only before the hour of 8 o'clock in the morning, from the 1st of May to the 1st of November, and before 9 o'clock in the morning, from the 1st of November to the 1st of May, and at no subsequent hours of the day or evening, under a penalty of \$5 for each offense: and if found out of order, cap off, or leaking, or if converted into jets, or suffered to run when not used, the supply will be cut off without previous notice.

5. No hydrant will be permitted on the sidewalk, or in the front area, and if standing in a yard or alley attached to any dwelling or building, will not be permitted to be kept running when not in actual use; taps at wash-basins, water-closets, baths, and urinals, must be kept closed in like manner.

6. Applications for water must state fully and truly all purposes for which it is required, and when paying the annual charges for it, parties must frankly, and without concealment, answer all questions put to them relating to its consumption. In case of fraudulent misrepresentation on the part of the applicant, or of uses of the water not embraced in his bill, or of willful or unreasonable waste of water, the Croton aqueduct board shall have the right to forfeit his payment, and the supply of water shall be stopped, unless the party shall promptly pay such additional charge as the board may impose.

7. The officers of the department personally, and every person by them delegated for the purpose, must have free access, at proper hours of the day, to all parts of every building and steam vessel in which Croton water is delivered and consumed.

8. The department reserves to itself the right to apply a meter to any such premises as they may deem advisable.

9. The penalty for a violation of any of the preceding rules

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and requirements, will be the prompt stoppage of the supply of water, without any further or other preliminary notice; nor will it be restored, except upon payment of the expense of shutting it off and putting it on, and upon a satisfactory understanding with the party that no future cause of complaint shall arise."

Annexed to these rules and regulations was the 27th section of the act of the legislature of April 11, 1849, which is in these words:

§ 27. "The rules and restrictions for the use of the water, printed on each permit, shall be notice to the water takers, and shall authorize the exaction and recovery, by process of law, of any penalties which the Croton aqueduct board may impose, in addition to the cutting off the use of the water, for any violation of the rules; and this section shall be printed on such permits."

The judge, at special term, decided as matter of law: 1. That the defendants had a legal right, upon the neglect and refusal of the plaintiffs to pay the extra Croton water rent of \$3606.25 for the year ending May 1st, 1856, after the notice given them to do so, to cut off and stop the supply of the Croton water to their hotel. 2. That the defendants were entitled to judgment dissolving the injunction issued in this action, and dismissing the complaint with costs. To these conclusions of law the plaintiffs excepted.

*John Van Buren*, for the appellants. I. The plaintiffs, being corporators and householders of the city of New York, have a legal right to the use of the Croton water, and are bound to pay the taxes therefor imposed upon them by law. (*Davies' Laws of 1834, ch. 256, p. 771; Id. 1838, ch. 127, p. 807; Id. 1841, ch. 306, p. 848; Id. 1843, ch. 231, p. 871.*)

II. The defendants, being about to deprive the plaintiffs of this use, and thus to cause irreparable injury to them, should be restrained by this court, unless they have shown a legal authority to do the acts which they threaten. (*Voorhis'*

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*Code*, § 219, and notes. *Eden on Injunctions*, *Waterman's ed.*, 259 and 267, and notes.)

III. The rents for the use of the Croton water, both regular and extra, are directed by law to be fixed by the common council, and they have no power to delegate any part of this authority to the defendants. (*Laws of 1849*, ch. 383, §§ 18 and 19. *Lyon v. Jerome*, 26 *Wend.* 485. *Thompson v. Schermerhorn*, 2 *Seld.* 92.)

IV. The ordinance of the common council, passed March 20th, 1851, so far as it gives the defendants authority to charge hotels, at their discretion, for the use of water, is void, and the provision of said ordinance, under which the defendants claim to have acted, has no application to the case of the plaintiffs, and is also void.

V. The testimony in this case furnishes no reliable data as to the amount of water consumed by the plaintiffs, nor is there any legal warrant for the manner in which the defendants pretend to have arrived at it.

VI. The statute confers no authority on either the common council or the defendants to cut off the plaintiffs' supply of Croton water, for the non-payment of rent. Where a statute imposes a penalty, and gives a particular remedy, this remedy must be pursued; and excludes all others. (*Sharp v. Speir*, 4 *Hill*, 76. *Same v. Johnston*, *Id.* 92. 9 *Pick.* 412. *Gilbert v. Columbia Turnp. Co.*, 3 *John. Cas.* 107. *Butler v. Palmer*, 1 *Hill*, 334. *Davies' Laws of 1849*, ch. 383, §§ 18, 19, to 26, p. 983. *Id.* 1851, ch. 298, p. 1029.)

*Richard Busteed*, for the defendants. I. The franchise of supplying the city of New York with water, is a special private franchise, made as well for the private emolument of the corporation of the city of New York as for the public good. The corporation, in the absence of any legislative conditions or restrictions affixed to the franchise, may manage and control it, and the property connected therewith, by itself and its agents, in the same manner as any rail road, ferry or gas com-

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pany might manage its franchise. (*Bailey v. The Mayor &c. of New York*, 3 *Hill*, 539, 541; *S. C. affirmed*, 2 *Denio*, 450. See also *Appleton v. The Water Commissioners*, 2 *Hill*, 433; *Clark v. The Mayor &c. of New York*, 3 *Barbour's S. C. Rep.* 290; *S. C.*, 4 *Comstock*, 338.) The corporation, therefore, may themselves fix, or authorize their agents to fix, the rates which shall be charged for the use of the water, the times at which those rates shall be paid, may refuse to supply the water, and may cut it off if the rates are not paid. These powers are obviously incident to the nature of the franchise granted them.

II. The corporation being in a certain sense a local sovereignty, can delegate to its agents such portion of the discretionary power conferred upon it by the legislature for the management of its various franchises, as may be necessary or convenient for it to do, in all cases where the legislature has not expressly, or by implication, required it to act exclusively in its corporate character. And this, in carrying on the city government, it does daily without question.

III. The act of April 11, 1842, in terms, gives the corporation authority to organize the Croton aqueduct department, and to confer upon it full powers for the management of the Croton water works. That act is still in force and that department in existence, and the defendants compose it. The act is a statutory warrant for any discretionary powers in respect to the "extra rents" conferred by the corporation upon the Croton aqueduct board.

IV. The object of § 18 of the act of April 11, 1849, (which act was passed on the petition of the corporation itself,) was not to abridge the recognized power of the corporation, and its agents, duly authorized to fix the charges for the use of the Croton water, (for that power had then been exercised for the space of seven years,) but it was simply to enable the corporation, provided they saw fit, by ordinance to establish a certain scale of water rents—to make those rents,

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like taxes, a lien on real estate. Their power to fix, directly, or by their agents, rates which should not be a lien upon real estate, was not interfered with by that act; certainly not in cases where large quantities of water were used. (§ 19 of the act.) (a.) Even then, if the corporation had delegated to the Croton board the power to fix the "regular" rents, the consequence would be, not that the rents fixed under that delegated power would be invalid, but that they would have failed to become a lien on real estate. (b.) This act was passed for the exclusive benefit of the corporation, and they were not obliged to act under it. In point of fact, for nearly two years they neglected to avail themselves of this statute, and continued their charges under the ordinances of September 7, 1842.

V. But the charge in question was not made at the discretion of the Croton board. The clause of the ordinance under which it was made, fixed the charge at one cent per one hundred gallons. The discretionary portion of this clause may be rejected. An ordinance may be void in part, and good for the rest. (2 *Kyd on Corporations*, p. 155. *Rogers v. Jones*, 1 *Wend.* 260. *State v. Sykes*, 4 *Indiana Rep.* 351.)

VI. An inspection of § 19 of the act of April 11, 1849, and of the clause of the ordinance of March 20, 1851, which refers to hotels, and the clause of the same ordinance, under which the charge was made in this case, it is submitted, will show that where hotels use two hundred gallons of water per day, the common council intended they should be charged according to the number of gallons of water actually used. (a.) This was not simply a hotel, but a large laundry, liquor bar, steam engine house and hotel combined together. (b.) If by an unintentional error the Croton board have made the charge in question, under a wrong clause of the ordinance, the plaintiffs can gain no advantage from such error, unless they show that it has resulted in an undue benefit to the corporation, or prejudice to them; in short, that the error has increased their charge. Until they do this, the error is one

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which concerns the corporation alone. (*City of Lowell v. Hadley*, 8 Metc. 180.)

VII. If the charge was correctly made, there can be no question of the right and duty of the defendants to cut off the water for its non-payment. The ordinance of the corporation, by which the plaintiffs were bound, without express notice of it, (2 *Kyd on Corporations*, p. 103,) so directs, in terms, and it was the only effectual mode of enforcing payment, these extra rents not being a lien on the property.

VIII. The Croton board had a right, if the corporation had made no provision, or none that was effectual to meet this case, to make the charge in question, and to cut off the water for non-payment of it, under the general powers conferred upon them by the act of April 11, 1842, and the ordinance under it, and by the acts of April 2d and 11th, 1849, and their rules established under those acts. They were the agents of the defendants, and bound to take care of their interest, independent of any statutes.

IX. The relief that the plaintiffs demand in their complaint is, that the court should ascertain what would be a just and equitable charge to be made against them in the premises. This the court has in substance done, and has found as a matter of fact that the charge made by the Croton board against the plaintiffs in this case is a just, fair and equitable one. And to this finding the plaintiffs have taken no exception, and they are bound by it.

X. This action, in any view of the case, has been misconceived. The plaintiffs have had the use and benefit of the water, and are bound to pay a fair price for it. The price fixed by the corporation being impartial and uniform towards all water takers, it would be a usurpation on the part of the courts to attempt to interfere with that price, as clearly as it would be for them to interfere with the rates of charge for market stalls or ferry franchises. (a.) There is a discretion and a confidence in these cases which the legislature has reposed in the common council, and not in the courts. (b.) The

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corporation, being the real party in interest, ought to have been made a defendant in the action in the first instance, and then most of the points in the case could not have arisen.

*By the Court*, INGRAHAM, J. The defendants, being the members of the Croton aqueduct board, are prosecuted by the plaintiffs, who are proprietors of the St. Nicholas Hotel, to prevent them from cutting off the supply of Croton water, for non-payment of the amount charged for the use of the same.

It appears from the evidence, that in 1853 the plaintiffs paid for the use of the Croton water the sum of \$1264.16, and for the year 1854, \$1545.75. That in 1855 the defendants attached meters to the pipes leading to the premises of the plaintiffs, for ascertaining the quantity of water used by them, and that the result of such examination proved that in 96 days, between July and November, the water used by the plaintiffs exceeded 8,000,000 of gallons; and that the whole amount of water used on the premises of the plaintiffs from May 1, 1855, for one year, exceeded 36,000,000 of gallons. For this quantity of water the defendants claimed, for that year, at the rate of one cent for every 100 gallons of water. This the plaintiffs refused to pay, and in consequence of such refusal the Croton board notified the plaintiffs that they would stop the supply of water. The plaintiffs thereupon commenced this action, and obtained an injunction against the defendants. Upon the trial of the action Mr. Justice Roosevelt held that the defendants were justified, on the refusal of the plaintiffs to pay the amount claimed, after notice given them, to cut off and stop the supply of water, and that the defendants were entitled to judgment, and a dissolution of the injunction. The plaintiffs excepted to these rulings. Upon the argument of this case it was urged, on the part of the plaintiffs, that the Croton board had no authority to cut off and stop the supply of water; and that the Croton board had no authority to charge at the rate claimed for the water used by the plaintiffs.

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It can hardly be necessary to examine the question whether in an ordinary case of a private dwelling, where the amount charged for the water becomes a tax on the land, and is to be paid whether water is used or not, the Croton board has authority to stop the supply of water. The whole argument of the plaintiffs is based on this proposition, and the claim is presented that being corporators and householders, they have a right to the water, and are bound to pay the tax therefor.

The money for building the works, for the supply of the city with water, was raised by a loan forming a debt of the city until paid, and it never could have been intended that such debt was to be left without means to be provided for its payment. The plaintiffs concede their liability as holders of the property for such tax as may legally be imposed on the land, although no such provision was made until long after the aqueduct was completed. The act of 1843 provided for raising by tax a sum equal to the payment of the interest, annually.

By the act of 1849, establishing the Croton aqueduct board, the common council were authorized by ordinance to establish a scale of annual rents for the supply of the Croton water, to be called the "regular rents," apportioned to different classes of buildings, and such regular rents were to become a charge or lien upon the houses and lots respectively. (*Davies' Laws*, p. 984.)

The expressions there used show that the rents intended were such as were applicable to classes of buildings throughout the city, and were to be ascertained by the size of the building rather than its occupation. Such charges were to be universal, and of an uniform rate, wherever the pipes were laid. By the 19th section, buildings and establishments which consume extra quantities of water, in addition to the regular rents might be charged with additional rents, to be called "extra rents."

By the 21st section, a list of the regular rents imposed is to be prepared, and the same is to remain a lien on the premises

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until paid. By the act of 1851, such arrears are to be collected in the manner therein specified, viz. by a sale of the property. And by the 9th section of the act of 1853, (*Davies' Laws*, p. 1146,) further provisions are made for the collection of the "regular rents."

The examination of these statutes shows conclusively that no provision exists making a charge for Croton water a lien upon property, except such as is included in the term "regular rents;" and that the payments provided for in the 19th section, for what is therein termed "extra rents," are not in any way made a lien upon the land, but must be collected by some other process.

It appears also from these statutes that the common council are to establish a scale of rents, which are to be called the regular rents, but that authority does not necessarily apply to the common council alone, as to the extra rents. The section authorizing such extra rents does not contemplate that such rates are to be fixed by them; but on the contrary, the fair presumption is that such charges are to be fixed by the board, varying in each case according to the quantity to be used. If this be so, then the right necessarily follows that they should regulate the terms on which such extra allowances should be made, and the conditions on which the water should be used. If, for instance, some large factory or other institution should see fit to require a supply of water so large as to consume more of the water than could be spared from the ordinary consumption of the city, without exposing the inhabitants to danger from such an over use of the water, no one for a moment would suppose that the Croton board had not authority to refuse such supply. Other instances might be given where such a power was necessary to be placed in the board, for the proper administration of the whole department; and the only rational interpretation of the whole statute, taken together, is that the Croton board has a right to make every such arrangement, as to extra supply of water, a matter of agreement,

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subject to such terms and conditions as the board shall deem necessary to impose.

If the use of an extra supply of water is to be considered as a special agreement, then the breach of that agreement on the one side by non-payment, justifies the board in refusing any longer to comply with such agreement on their part, and of course justifies them in declining to furnish the water after such breach on the part of the taker. This would be entirely independent of any sanction that might be given by the statute to such a course. In the 27th section of the same act it is provided that rules and regulations for the use of the water, printed on the permit, shall authorize the recovery of penalties, in addition to the cutting off the water, for any violation of the rules, &c.

There is no special provision in the act authorizing the cutting off the water, excepting so far as is contained in this section. It is clear that for some purpose such power was conceded to exist, and I think the proper and only construction to be given to this section is, that the legislature intended the water should not be furnished to those who would not pay for it, and that the power would exist in those who had charge of this department to withhold the supply, if the terms on which such supply was furnished were not complied with. The words, "in addition to the cutting off the water," used in that section, is not to be applied merely to the penalties for violating those rules, but are rather to be considered as conferring a general power extending to the whole supply of water, and as one of the means by which payment for the use of such water should be enforced.

Under the act of 1842, (*Laws of 1842, ch. 225*), full power was given to the common council to organize the department as well for the management as for the distribution of the water; and such authority necessarily included the right to regulate the use and fix the terms in cases where no special provision by law to the contrary existed. The ruling of the judge upon this point was not erroneous.

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The other objection made by the plaintiffs is to the rate charged for the water, and the finding as to the quantity used. My view of this question has been in part expressed in the foregoing portion of this opinion. If the Croton board had authority, as I think they had, to make the use of extra quantities of water a matter of special agreement, then there can be no doubt but that they also had full authority to fix the price to be paid therefor, only to be controlled by the minimum price limited by the common council, and the other provisions of that ordinance. By ordinance of the common council of 1851, the common council authorized the Croton board to charge extra rates for the use of the Croton water in special cases, and vested in the Croton board a discretion in certain cases. This discretion is objected to by the plaintiffs as unauthorized by the statute. I think, however, there is no ground for such objection. So far as relates to the "regular rents," which are to be liens on real estate, it would be objectionable, and no such lien could be created unless the amount was fixed by the common council. I have already shown that these charges are not "regular rents," and can in no event be such liens. Independent of these provisions, there is nothing which requires the common council to fix the rates called "extra rents," and nothing which prevents that power from being conferred upon the Croton board. In the absence of any legislative provision to the contrary, the power given to the common council to organize the board and invest it with necessary powers for the distribution of the water, the provisions of the charter of 1849 continuing the Croton board, with the powers of distributing the water, collecting the revenues from the sale of the water, and such other powers as may be conferred by law, would be ample authority for any such power as has been exercised in the present case. The defendants contended, on the argument, that if it were not, the ordinance referred to authorized expressly a charge of one cent for every 100 gallons used by any business beyond 10,000 gallons per day, and therefore the charge as made by them was

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authorized by that ordinance, and was so fixed by the common council; and the presiding justice has found that such was the rate at which the charge was made.

I do not think that provision of the ordinance can be resorted to, in aid of this judgment. The authority there given to charge one cent for every 100 gallons, is in a case where the business used more than 10,000 gallons daily. A slight calculation will show that to come within that provision, the establishment must use more than 36,500,000 gallons annually; while, on the trial of this case, the whole amount of the water used during the year was found to be 36,072,744 gallons, or less than the amount required.

But I do not deem it necessary to bring this case within these provisions, in order to sustain the right of the Croton board to fix the extra rates. I am clearly of the opinion that full power exists in the Croton board, under the statutes and ordinances, to make special charges for the use of the water, in special cases for which no rate is fixed by law, and that there is no ground for interfering with the judgment on that account.

The plaintiffs also object to the amount found by the court as the quantity of water used by them during the year. It is a sufficient answer to this objection that this is a question of fact to be found by the court, that the only ground on which we can review that finding is that it is against the weight of evidence, and that no evidence has been inserted in the papers submitted to us on this appeal. We must therefore take the findings of fact, as made by the court, to be correct, and can only look at the questions of law presented on those findings.

The amount of water which the court has found was used during the year, by the plaintiffs, was 36,072,744 gallons, and was less than would have been consumed at the average rate of 10,000 gallons per day. The provisions of that ordinance, so far as applies to a quantity which exceeded that amount, have nothing to do with this case, and there is no charge prescribed in the ordinance applicable to it. It would therefore

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come within the discretionary power conferred on the commissioners, and which I have already said they may lawfully exercise. In fixing the rate to be paid, they have adopted the minimum rate prescribed by the common council for the use of a larger quantity. Of this the plaintiffs have no cause to complain. The extra use of the water is not compulsory. If they use it, they should be willing to pay the price which the authorities have stated to be the lowest sum at which the aqueduct department shall furnish such supplies. If not so paid, the course taken by the defendants was one authorized by the law, and necessary for the proper management of the department; and without the remedy there adopted, the department would be remediless.

The judgment should be affirmed.

[NEW YORK GENERAL TERM, December 13, 1859. *Roosevelt, Sutherland and Ingraham*, Justices.]

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JOHN McLOUGHLIN and THOMAS MULDOON, executors, &c.  
*vs.* THOMAS E. McLOUGHLIN and others.

A testator, by the first clause of his will, gave and bequeathed to various relatives legacies amounting in the whole to \$11,000; and he directed that such legacies be paid in such order, and by such installments, or otherwise, as his executors might deem most for the interest of his estate; and that they should pay interest thereon from the time of his death, half-yearly, until they should be paid. He then gave and bequeathed to M. M. \$250 in quarterly payments, for life; and to the Roman Catholic Orphan Asylum, in the city of New York, \$100 a year, until the lapse of 21 years from the time of the testator's death, or until the death of the survivor of his two youngest children living at the time of his death. And he directed his executors to apply, at their discretion, \$50 a year to the relief of the poor of St. Mary's church, in Grand street, New York, until the lapse of 21 years from his death, or until the death of the survivor of his two youngest children. The last three legacies and annuities were to be a charge on the testator's leasehold property No. 197 Chatham street. By the seventh clause, in case he should leave more than one child him surviving, the tes-

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tator divided the rest, residue and remainder of his estate, real and personal, into so many equal shares as there were children, and he gave one of said shares, as applicable to each child, to his executors and the survivors and survivor of them, his heirs and assigns for ever, *in trust* for the benefit of such children and their issue. The testator left him surviving two children. His personal estate was not sufficient, after the payment of his debts, to pay in full the legacies given by the will.

- Held*, 1. That the whole frame and scheme of the will plainly showed that the testator intended the legacies to be paid absolutely, and at all events; and that they were a charge upon the whole real estate of the testator; and if necessary his real estate, other than the leasehold interest in 197 Chatham street, must contribute to the full payment thereof.
2. That the legacies must be paid, in full, before the residue and remainder could be held and applied upon the trusts and to the uses declared in the seventh clause, &c.
3. That the direction to the executors to apply at their discretion \$50 a year to the relief of the poor of St. Mary's church was valid, and could be enforced.

**A**PPEAL from a judgment entered at a special term. The action was instituted by the plaintiffs as executors of the last will and testament of Peter McLoughlin, for the purpose, among others, of obtaining the judgment of this court as to the proper construction of said will. The will was as follows:

*“First.* I give and bequeath to my sister Alice, widow of Andrew Muldoon, \$5000; to my sister Bridget, the wife of Patrick Byrnes of Chiconet, Susquehanna county, state of Pennsylvania, \$1000; to my nephew John McLoughlin, son of my brother Patrick, \$2500; to my niece Bridget, daughter of said Patrick, \$2500; and I direct that the said legacies be paid in such order, and by such installments, or otherwise, as my executors may deem most for the interest of my estate, and that they pay interest thereon from the time of my death half-yearly, until they shall be respectively paid.

*Second.* I give and bequeath to my half sister Mary McLoughlin \$250 a year, in quarterly payments, from the time of my death, as long as she lives; such annuity to be a charge on my leasehold estate, known as No. 197 Chatham street, in the city of New York.

*Third.* I give and bequeath to the Roman Catholic Orphan

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Asylum in the city of New York \$100 a year, until the lapse of 21 years from the time of my death, or until the death of the survivor of my two youngest children living at the time of my death, or the death of my only child, if I leave but one, whichever event may first happen; such annuity to be a charge on my leasehold estate No. 197 Chatham street.

*Fourth.* I order and direct my executors to apply, at their discretion, \$50 a year to the relief of the poor of St. Mary's church in Grand street, at the corner of Ridge street, in the city of New York, until the lapse of twenty-one years from the time of my death, or until the death of the survivor of my two youngest children living at the time of my death, or the death of my only child, if I leave but one, whichever event may first happen; such annual payment to be a charge on my said leasehold property, No. 197 Chatham street, in the city of New York.

*Fifth.* I give, devise and bequeath to my wife Ann F. C. McLoughlin, so long as she shall continue my widow, the use of my dwelling house, known as No. 232 Madison street, in the city of New York, and all my household furniture.

*Sixth.* I give and bequeath to my eldest son living at the time of my death, my watch and watch chain; if I should not leave any son, I give the same to my said nephew John McLoughlin.

*Seventh.* In case I should leave more than one child me surviving, I divide the rest, residue and remainder of my estate, real and personal, into so many equal shares as I may leave children; and I give, devise and bequeath one of said shares as applicable to each of said children as follows, namely: I give such share to my executors hereinafter named, or to such of them as qualify as such executors, and the survivors or survivor of them, his heirs and assigns for ever, in trust to receive the rents and profits thereof, and to apply the said rents and profits to the use of such child as long as such child lives; and on the death of such child, leaving lawful issue, then in trust to grant, convey and deliver such shares to such

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issue in equal shares, said issue taking by roots or stocks, and not by polls; and if such child should die without leaving lawful issue, then in trust to grant, convey and deliver such share absolutely to the next of kin of such child being my descendants, in such proportion as they would be entitled to take the same from such child as his or her next to kin; and in case such share was his or her personal estate, and he or she had died intestate, and without wife or husband him or her surviving, and in default of any such next to kin, then in trust to grant, bargain, sell and convert the same into money, and to pay and divide the proceeds of such share between and among my nephews and nieces who may be living at the death of such child, and the descendants of such of my said nephews and nieces as may then be dead, all my said nephews and nieces if living to take equal shares by polls, and the descendants of any of such nephews and nieces as may then be dead, to take by roots or stocks the share or proportion, only which the deceased nephew or niece whom they may represent would have taken if living.

*Eighth.* In case I should leave but one child me surviving, then I give, devise and bequeath the whole of such rest, residue and remainder of my real and personal estate to such person or persons, and upon the like trust, as applicable to such child and to his or her issue, and to his or her next of kin being my descendants; and in default of any such next of kin, to my nephews, nieces and their descendants as are mentioned and expressed in the seventh clause of this will touching the several shares of my residuary estate therein set apart as applicable to each of my children, in the event of my leaving more than one child."

The cause was tried before Justice MITCHELL, without a jury, at the New York circuit, in January, 1857. The judge found and decided as matter of fact: 1st. That the testator died on the fourth day of February, leaving a last will and testament, as set forth in the complaint and evidence, which was duly proved before the surrogate of the county of

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New York, and letters testamentary therein issued to the plaintiffs, who took upon themselves the execution thereof. 2d. That the said testator left him surviving his widow, Ann F. C. McLoughlin, and two children, Thomas Edward McLoughlin and Mary Ann McLoughlin, infants. 3d. That the said widow intermarried with Daniel N. Dugan, in the month of May, 1856. 4th. That the personal estate of the said testator was not sufficient, after the payment of his debts, to pay in full the legacies given and bequeathed in and by his said will. And the said justice found and decided as matter of law, that the real estate of the testator was not liable to pay the said legacies, or any deficiency therein, after the application of the whole personal estate to the payment thereof. To which decision the plaintiff John McLoughlin, and the defendants Alice Muldoon, Bridget Byrnes and Bridget McLoughlin, excepted. And thereupon judgment was entered in said action, in and by which it was decided and adjudged:

1st. That Ann F. C. Dugan, widow of the testator, having married Daniel N. Dugan since the death of the said testator, to wit, on the 31st day of January, 1856, was not entitled, after the said subsequent marriage, to the use of the dwelling house known as No. 232 Madison street, or of the household furniture of the deceased, bequeathed in the said will to the said Ann F. C., so long as she continued the widow of the testator.

2d. That the bequest of the annuity to Mary McLoughlin of \$250 a year was valid, and was a charge upon the leasehold estate known as No. 197 Chatham street, and upon no other fund.

3d. That the bequest of the annuity to the Roman Catholic Orphan Asylum in the city of New York of \$100 a year was valid, and a charge upon the said leasehold estate 197 Chatham street, and upon no other fund.

4th. That the bequest of the annuity to the poor of St. Mary's church in Grand street, at the corner of Ridge street, in the city of New York, of \$50 a year, was invalid and void.

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5th. That all the other bequests, devises and trusts contained in the said will were valid. .

6th. That the legacies given in and by said will to Alice Muldoon, Bridget Byrnes, John McLoughlin and Bridget McLoughlin respectively, were not, nor was either of them, chargeable upon the real estate of which the testator died seized, but were to be paid out of the personal estate of the testator, if sufficient for such purpose; and if not sufficient, then that the said legacies were to abate proportionably.

7th. That the plaintiffs, as executors of said will, or the survivor of them, be and they were thereby authorized to sell and dispose of the said leasehold estate No. 197 Chatham street, and out of the proceeds of sale to purchase an annuity for the said Mary McLoughlin, and for the said Roman Catholic Orphan Asylum respectively, for the periods mentioned in the will, and to apply the residue of said proceeds towards the payment of the legacies given and bequeathed in the first item of said will, viz. to said Alice Muldoon, Bridget Byrnes, John McLoughlin and Bridget McLoughlin.

8th. That each of the parties in this action, excepting the defendants Daniel N. Dugan and Ann F. C. Dugan his wife, out of the estate of the testator in the hands of the plaintiffs, be paid their costs in this action, with a counsel fee or allowance in addition.

The plaintiffs appealed from the 4th and 6th clauses of this judgment or decree, and the defendants Alice Muldoon, Bridget Byrnes and Bridget McLoughlin from the 6th clause.

*John E. Develin*, for the plaintiffs. I. The order and direction of the testator to the executors to apply in their discretion \$50 a year to the relief of the poor of St. Mary's church is a charitable bequest, and as such is valid. (*Williams v. Williams*, 4 *Selden*, 525.) The order to the executors named in the will to apply the \$50 per annum is positive, and makes them trustees for that purpose. (*Stubbs v. Sargon*, 2 *Keen*, 255. 3 *Mylne & Craig*, 507.) And the discretion given to

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them is not as to whether they will make the application, but as to the subjects of it ; and the same degree of certainty is not required in regard to the objects of a charitable bequest as in other cases. (*Williams v. Williams, ubi supra.*)

II. The personal property of the testator having proved insufficient to pay the legacies in full, they ought not to abate, but were intended by the testator to be a charge upon the real estate ; which intention is clearly inferable from the will, and is therefore the same as though the charge had been made in express words. (*Harris v. Fly, 7 Paige, 421.*) The provisions of this will touching this point are: "I direct that the said legacies be paid in such order, and by such installments or otherwise as my executors may deem most for the interest of my estate, and that they pay interest thereon from the time of my death half-yearly, until they shall respectively be paid. In case I should leave more than one child me surviving, I divide the *rest, residue and remainder* of my estate, real and personal, into as many shares as I may leave children. I give, devise and bequeath one of said shares, as applicable to each of said children, as follows." The testator then devises the rest, residue and remainder to his executors who may qualify, and directs them to apply the proportionate part of the rents and profits to the use of each child during his life, with cross remainders in case of death of either. The direction in the will is, substantially, that the executors shall pay these legacies ; for it is left with them by the testator to decide what time and manner of payment would be most for the interest of his estate, the whole of which, real and personal, is given to the executors as above mentioned. The testator, when giving this direction to his executors in regard to the payment of the legacies, refers not to his personalty or his realty, but to his entire estate—thus blending the personalty and realty, and making them one fund to be effected by the payment—a plain indication, that in his own mind the testator considered his whole estate as the fund out of which the legacies were to be paid, and consequently of his intention that both the per-

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sonalty, and afterwards the realty if necessary, should contribute to the satisfaction of the bequests. (*Bench v. Biles*, 4 *Madd.* 187. *Tracy v. Tracy*, 15 *Barb.* 503. *Rafferty v. Clark*, 1 *Brad.* 473. *Hassanclever v. Tucker*, 2 *Binn.* 525.) The testator intended that the legacies should be paid in full; for he directs interest to be allowed from the time of his death half-yearly, until the legacies are paid; and thus, by implication, declares that he intended there should be no abatement. There is no specific or general disposition of any of the real estate of the testator in any section preceding the seventh section of his will, and in that section he devises "the rest, residue and remainder of his estate, *real* and personal," &c. These words are decisive of the intention of the testator to charge his realty to pay these legacies; for unless he intended to charge them on the real estate, the words "rest, residue and remainder," so far as the realty is concerned, would be inappropriate and without meaning. In this respect, the present case differs from the case of *Lupton v. Lupton*, (2 *John. Ch.* 614,) cited by Judge Mitchell at special term; for in the will there construed, the testator, before the residuary clause, had made devises of part of his real estate, as well as given legacies, and the doctrine of *singula singulis* was applicable: not so here. (2 *Jarman on Wills*, 532, 3, 4. *Aubrey v. Middleton*, *Vin. Abr. tit. Charge D.* *Hassell v. Hassell*, 2 *Dick.* 526. *Brudenell v. Boughton*, 2 *Atk.* 268. *Bench v. Biles*, 4 *Madd.* 187. *Cole v. Turner*, 4 *Russ.* 376. *Morehouse v. Scaife*, 2 *Myl. & Craig*, 695. *Tracy v. Tracy*, 15 *Barb.* 503. *Rafferty v. Clark*, 1 *Brad.* 473. *Nichols v. Postlewhaite*, 2 *Dall.* 131.)

III. The judgment of the special term should be reversed, and the legacies declared a charge upon the lands of the testator to the extent to which the personal property is insufficient to pay them.

*Wm. Fullerton*, for the infant defendants. I. The testator gave and bequeathed to his half sister Mary McLoughlin an

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annuity of \$250, and added, "such annuity to be a charge on my leasehold estate known as No. 197 Chatham street, in the city of New York." He also gave and *bequeathed* to the Roman Catholic Orphan Asylum \$100 a year, for 21 years, and added, "such annuity to be a charge on my leasehold estate No. 197 Chatham street." To the other legatees he used similar language, "I give and bequeath," but did not make the other legacies a charge upon any part of his real estate. The testator then, after dividing the rest, residue and remainder of his estate, real and personal, into as many shares as he had children, proceeds, "I give, devise and bequeath one of said shares to each of said children as follows, namely: I give such share to my executors hereinafter named, and the survivors or survivor of them, his heirs and assigns for ever, in trust to receive the rents and profits thereof, and to apply the said rents and profits to the use of such child," &c.

II. The personal estate is the primary fund for the payment of debts and legacies, and the legal presumption is, where a legacy is given without any specification as to the fund out of which it is to be paid, that the testator intended it should be paid out of the personal estate only; and if that is not sufficient, the legacy fails. (*Harris v. Fly*, 7 *Paige*, 425.)

III. The real estate is not charged with legacies, unless that intent is expressed or clearly to be inferred from the will. (*Lupton v. Lupton*, 2 *John. Oh.* 614.) Such intent is not expressed in this case as to the legacies, nor is there any thing in the will to give rise to an *inference* that the testator intended to charge the lands with them. A contrary intent is manifest from the will. The *annuities* are in terms made chargeable on the Chatham street property. If the testator had intended to make the *legacies* chargeable upon lands, he would have employed like apt language for that purpose.

IV. The devise to the executors is in trust; they take no interest whatever in the lands,

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*By the Court, SUTHERLAND, J.* The judge, at special term, found and decided, as matter of fact, that the personal estate of Peter McLoughlin was not sufficient, after the payment of his debts, to pay in full the legacies given and bequeathed by his will. He also found and decided, as a conclusion of law, that the real estate of the testator was not liable to pay the said legacies, or any deficiency, after the application of the whole personal estate to the payment thereof.

It does not appear from the complaint, or from the evidence in this case, what the term of the lease of 197 Chatham street, of which the testator died seised or possessed, was; whether it was for a term of years, or for the life of another, or in perpetuity; but as the judge, notwithstanding his decision and conclusion of law, that the real estate was not liable to contribute to the payment of the legacies, by the judgment which was entered, authorized the lease to be sold by the executors, and the proceeds to be applied to the payment of the legacies given by the first article of the will, after first providing for the payment of the annuities to Mary McLoughlin, and to the Roman Catholic Orphan Asylum, specifically charged thereon, I must assume that he did not consider the lease to be real estate, and that it must have appeared, or have been conceded on the trial, that the lease was for a term of years, or for the life of another, and was deemed to be assets of the testator, and as such to have passed to his executors on his death.

As the plaintiffs, the executors, and the defendants, Alice Muldoon and others, the legatees mentioned in the first article of the will, excepted to such decision of the judge, that the real estate was not liable to contribute to the payment of the legacies, and have appealed from such decision, I assume, what does not appear very clearly from the case, but was conceded on the argument, that the proceeds of the sale of the lease of 197 Chatham street, after providing for the payment of the annuities and legacies specifically charged thereon, will not be sufficient, together with the other personal estate of the testator, to pay his debts and the other legacies in full.

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The question then is, whether the real estate of the testator, of which he died seised in fee, is liable to pay the legacies given by the first article of the will, or any deficiency, after the application of the personal estate, and of what shall remain of the proceeds of the sale of the lease, after providing for the payment of the legacies expressly charged on the lease.

By the first article of the will, the testator gives to his two sisters Bridget Alice Muldoon and Bridget Byrnes, and to his nephew John McLoughlin, and to his niece Bridget Byrnes, severally, legacies amounting in the aggregate to \$11,000, and he directs, "*that the said legacies be paid in such order, and by such installments, or otherwise, as my executors may deem most for the interest of my estate, and that they pay interest thereon, from the time of my death, half yearly, until they shall be respectively paid.*" By the second article, he gives an annuity of \$250 a year for the term of her life to his half sister Mary McLoughlin; by the third, an annuity or legacy of \$100 a year to the Roman Catholic Orphan Asylum in the city of New York, until the lapse of 21 years from the time of his death, or until the death of the survivor of his two youngest children living at the time of his death, or the death of his only child, if he left but one; by the fourth, he directs his executors to apply, at their discretion, \$50 a year to the relief of the poor of St. Mary's church in Grand street, in the city of New York, for and during the same term that he directs the \$100 a year to be paid to the Roman Catholic Orphan Asylum. The legacies given by the 2d, 3d and 4th articles of the will, he directs to be a charge upon his leasehold estate, 197 Chatham street. By the fifth article of his will, the testator devises and bequeathes to his wife, so long as she shall continue his widow, his dwelling house, No. 232 Madison street, and all his household furniture.

Other than this devise to his wife, there is no devise of any part of the real estate, worth, it appears, over \$70,000, until you come to the seventh article of the will. This article of the will is curiously and somewhat obscurely drawn, and in-

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tended very carefully to avoid any unlawful restraint upon the power of alienation. It is enough, for the purpose of deciding the questions before us on this appeal, to say, that the seventh article of the will is, in effect, a devise and bequest of all the rest, residue and *remainder* of the testator's estate, real and personal, to his executors, upon certain express trusts, the validity of which are not questioned in this action; so that on the death of the testator, all his estate, real and personal, except the estate and interest devised and bequeathed to his wife during her widowhood, in his dwelling house and furniture, vested in his executors in trust, as executors, and under the seventh article of the will, subject to the payment of the debts and legacies. Indeed, if the testator had directly and in the first instance devised and bequeathed all his estate, real and personal, subject to the estate and interest given his wife during her widowhood, to his executors, in trust, therefrom to pay his debts and the legacies, and to hold the residue and remainder thereof upon the trusts and for the uses declared in the seventh and subsequent articles of the will, his intention that the legacies should be paid absolutely and in full, before the residue and remainder could or should be held and applied upon the trusts and to the uses declared in the seventh and subsequent articles, would not have been more apparent.

The whole frame and scheme of the will plainly shows that the testator intended the legacies to be paid absolutely and at all events. The devise and bequest, by the seventh article, to his executors, in trust for his children, &c., is not only in words a devise and bequest of the rest, residue and remainder, *after* the previous bequests of the legacies, but he directs interest to be paid on those not charged specifically on his leasehold interest in 197 Chatham street, payable as annuities from the time of his death. Why should he direct interest to be paid on these legacies from the time of his death, if he did not intend that they should be paid absolutely and at all events? Probably the testator intended that the income from

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his real estate, including 197 Chatham street, should help pay the legacies given by the first article of the will; hence he directs those legacies to be paid in such order and by such installments, or otherwise, as his executors should deem most for the *interest of his estate*.

It is plain to me, that these legacies are a charge upon the whole real estate of the testator, and that if necessary, his real estate, other than the leasehold interest in 197 Chatham street, should and must contribute to the full payment thereof.

The judge, at special term, also held and decided that the bequest of the annuity of \$50 a year for the use of the poor of St. Mary's church in Grand street, was invalid and void. As appears from the judge's opinion, his decision on this question was a mere matter of form, so that the question might go up to the general term with the other question as to the legacies. There can be no doubt that the direction of the testator to his executors to apply, at their discretion, \$50 a year to the relief of the poor of St. Mary's church, was valid and can be enforced. The testator, in effect, left nearly the whole of his estate to his executors; why could he not direct them out of it to pay \$50 a year to the poor of St. Mary's church? He could have paid that sum yearly for their relief in his lifetime, and he could, by his will, direct his executors to do it after his death. The discretion given to the executors as to the application, does not affect the validity of the direction or bequest. It would be very extraordinary if there were no poor of that church. The executors can and must act, and exercise their discretion. I can see no principle upon which this direction or bequest is invalid. The bequest is not to the poor, but to the executors, for the benefit of the poor. The executors take the whole estate, and can execute the charity. The testator has seen fit to give them a discretion as to the application of the annual payment, and they can and ought to exercise that discretion.

The judgment, at special term, must be modified so as to

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conform to the conclusions of this opinion on the only two questions which appear to be presented by the appeal.

The costs of all parties on this appeal must be paid out of the estate of the testator in the hands of the plaintiffs.

[NEW YORK GENERAL TERM, December 22, 1859. *Roosevelt, Ingraham and Sutherland*, Justices.]

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A party whose judgment has been illegally vacated will not be deprived of his lien, if he ultimately reverses the order which set aside his judgment; unless the equities of bona fide purchasers or incumbrancers intervene.

Thus, where a judgment which was the first lien upon mortgaged premises after the mortgage, was vacated and set aside on the ground of irregularity, by an order which was subsequently reversed on appeal; *Held*, that the lien of such judgment was not lost, by the vacatur; but that the judgment was entitled to be first satisfied out of the surplus moneys arising from a sale of the premises, under the mortgage, in preference to junior judgments.

**A**PPEAL from an order made at a special term confirming the report of a referee as to the priorities of the several liens upon surplus moneys. The fund in the court was the surplus proceeds of the foreclosure sale in this cause, after satisfying the claims of the mortgagees. The claimants of this fund were: 1. Theodore C. Foote and Daniel D. Foote, who obtained a judgment in this court against Dennis Harris, owner of the mortgaged premises, which was filed and docketed January 1, 1856, for \$4607.90, and who regularly filed a claim to the surplus in this cause. 2. Bartolome Blanco, who recovered a judgment in this court against Harris, which was filed and docketed April 3, 1856, for \$72,685.66. An attachment was issued in this action, and levied on the mortgaged premises, January 7, 1856. 3. Jose T. Alfonso and others, who recovered a judgment in this court against Harris, which was filed and docketed January 30,

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1856, for \$13,610.65. Execution was issued on the Foote judgment, and subsequently, on February 29, 1856, an order was made at a special term, setting aside the judgment and execution *for irregularity*, and vacating the judgment on the docket. A memorandum of this order was entered on the docket. On appeal, this order of the special term was *vacated and set aside* by an order made at general term, May 8, 1856. This order was delivered to the clerk May 12. A memorandum of this order was entered on the docket, October 21, 1856. Upon motion at general term, on the part of Harris, an order was made November 23, 1857, (by default,) by which the order of May 8, 1856, was opened, and the appeal from the order of February 29, 1856, ordered to stand for argument. On November 30, 1857, the order of November 23 was "*vacated and wholly set aside*;" and the motion to set aside the order of May 8, 1856, was denied. The sale of the mortgaged premises took place February 5, 1857; and the proceeds in the chamberlain's hands amounted to \$2446.25. Mr. Cambreling, who was appointed referee to ascertain the priorities of the liens, reported that the Foote judgment became a lien on the mortgaged premises January 1, 1856, and so continued till February 29, 1856, when the judgment and docket thereof were vacated; and that said lien was not revived till October 21, 1856, when the docket of the judgment was restored; that Blanco's judgment, docketed April 3, 1856, related back to the levy of the attachment, January 7, 1856, and became a lien from that day; and that Blanco was entitled to the fund in court, as having the first lien. Upon exceptions to this report, on the part of the Footes and of Alfonso and others, the report was confirmed at a special term, and T. C. and D. D. Foote, and Alfonso and others, appealed.

*Wm. M. Evarts*, for the appellants T. C. and D. D. Foote.

*R. S. Emmet*, for Alfonso and others.

*John Anthon*, for Blanco.

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*By the Court*, MULLIN, J. On or about the 12th June, 1856, an action of foreclosure was commenced by the plaintiffs, as mortgagees, against Harris, the mortgagor, and others, to foreclose a mortgage. In or about October, 1856, judgment was entered in that suit, and the premises were sold about the 5th February, 1857. There was a surplus, arising from the sale, of \$2646.25. On the 1st of January, 1856, a judgment was docketed in this court in favor of Theodore C. Foote and D. D. Foote, against Harris, the defendant in this suit, for \$3456.37, and on that day it became a lien on the mortgaged premises. On the 29th February, 1856, this judgment was set aside for irregularity, and an entry of its vacatur made on the docket, by order of the court. On the 8th May, 1856, an order was made by the general term, to which an appeal had been taken from the above order of the special term, vacating that order, by default.

On the 23d November, 1857, an order was made, I conclude by default, vacating the order of the general term of the 8th May, 1856. And on the 30th of November, 1857, the last mentioned order of the 23d of the same month was vacated, and a motion to set aside the order of the general term of the 8th May, 1856, was denied. The owners of this judgment apply for the surplus moneys, on the ground that their judgment is the first lien thereon.

On the 2d of January, 1856, Bartoleme Blanco commenced an action in this court, by attachment, against the defendant Harris, which attachment was delivered to the sheriff on that day. Judgment in that action was docketed against the defendant on the 3d of April, 1856, for \$12,685.66. The owners of this judgment claim the surplus, on the ground that theirs is the oldest lien on the premises, subsequent to the mortgage; the lien attaching from the delivery to the sheriff.

On the 4th December, 1855, Jose S. Alfonso and others commenced an action in this court against the defendant Harris and others, and on the 30th of January, 1856, judgment was duly docketed in said action, in favor of the plaintiffs,

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for \$13,610.65. The owners of this judgment also claim the surplus.

If the judgment in favor of Foote can maintain its priority, it is entitled to the whole fund, and it will be unnecessary to inquire into the priority of the other two judgments.

It is insisted, that the judgment of Foote lost its priority by reason of the order of the special term of February, 1856, vacating and setting aside that judgment and the entry of it on the docket; and that the reversal of that order by the general term did not revive the lien which was destroyed by the entry on the docket; and that in order to revive it, as of the date of the original docketing, it was necessary that the court should order it docketed *nunc pro tunc*; and as no such order has ever been made, the lien did not attach again until the entry on the docket in October, 1856, of the fact of reversal of the order of the special by the general term in May, 1856. If these positions are correct, then the Foote judgment has no claim to the surplus.

It is argued by the counsel of the owners of the other two judgments that the vacatur of the judgment of Foote, and the entry on the docket, terminated the lien; and that although the reversal of the order might revive the judgment, it did not get rid of the entry on the docket; and as the judgment is not a lien until docketed, the judgment when revived was not redocketed; and hence no lien was obtained, by reason of the revivor.

It seems to me that this reasoning is fallacious. The entry on the docket of the judgment was not destroyed or defaced by the order of the special term. The entry, in pursuance of the order, had the effect to terminate the lien; or rather, it informed all concerned that it was no longer a lien. So in regard to the judgment. The record remained on file, and the orders remained on the books of the clerk, as if no order had been made; but the judgment was, in contemplation of law, destroyed. When the order of the general term was entered, it had the same effect upon that branch of the order of the

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special term relating to the docket that it had on that part relating to the judgment. If reversing that part relating to the judgment revived the judgment, as of the day when it was vacated, then surely the lien was revived from the same time when the entry cancelling the docket was swept away.

I do not mean to say that either the judgment, or its lien, is revived for all purposes, and against all parties. Such, I apprehend, is not the law. After the entry of the order of the special term, all persons dealing with the real estate of the judgment debtor as bona fide purchasers and incumbrancers, and all commencing actions affecting the real estate, would be at liberty to act as if no such judgment had ever been docketed; and the subsequent reversal of the order could not affect such parties or their proceedings. Such parties have a clear, equitable and legal claim to protection against any inquiry arising from the reversal of the order, after their rights have attached. But there is no such equity in favor of judgment creditors, who became such by adverse proceedings, or by confession; unless it may be when the confession is given to secure advances, or under such circumstances as constitute the plaintiff a bona fide incumbrancer for value. The bona fide purchasers and incumbrancers deal with property with notice, and on the faith of the order vacating the judgment; in other words, they deal with the debtor's property as if the judgment had never been a lien on it. They pay or advance money upon the property freed from the lien of such judgment. Having thus acted, it would be a fraud upon them to revive the lien, and give it a preference over their lien or title. But the judgment debtor who obtains his judgment by action, has not been influenced in his action by the order vacating the judgment. He has parted with nothing on the faith of such order, and he is not made a loser by its reversal and the revival of the lien. I do not mean that he is not by the reversal made worse than he was while the order of the special term was in force, but I mean no worse than he was when he recovered his own judgment. His judgment was then previous

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to Foote's, and is placed by the reversal in the same relative position.

The learned counsel for the junior judgment creditors seem to place great stress on the fact that no entry of the reversal was made on the docket until October, 1856, and that the original entry made pursuant to the order of the special term was permitted to stand until that time. According to my understanding of the law, these parties had no interest in the docket, beyond the fact of the entry or non-entry of the Foote judgment therein. If it was docketed then, it became a lien; if it was not, then it was no lien. What happened to the judgment, or its docket, after that, would affect the parties according to their equitable rights as between each other, and as between them and the judgment debtor. In other words, the lien of the judgment would be recognized or disregarded, as the equities of the case might require. The docket of a judgment performs a double office: it creates a lien, and gives notice to parties dealing with the judgment debtor and his property, of the charges upon him and it. Bona fide purchasers and incumbrancers, only, can complain of the want of notice. The judgment creditor proceeding adversely has no equities arising from the want of notice. Let us suppose that Blanco's judgment became on the day it was docketed a lien on 100 acres of land, of which Harris had the title; and that before the recovery of the judgment, an action had been brought to compel Harris to reconvey to his grantor 50 of the 100 acres, on the ground of fraud in acquiring the title, judgment is recovered declaring the purchase by Harris fraudulent, and directing an entry on the record of the deed to that effect. This judgment is afterwards, in all things, reversed. Now can it be contended that it would require any entry on the record of the deed, in order to subject the 50 acres to the lien of Blanco's judgment? I apprehend not. Yet all persons dealing with the land after the entry, are charged with notice of the judgment and its effect on the title. And until something is done to take away the effect of this notice, bona fide

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purchasers and incumbrancers have the right to treat the lands as not charged with the lien of the judgment. But could the judgment creditors of Harris claim any equities, because no entry of the reversal was made on the record? I apprehend not. Yet the equity to do so is just as strong as it is to acquire a preference over Foote's judgment, because there was no entry of reversal on the docket. But it is unnecessary to discuss the question further. It seems impossible that a party whose judgment has been illegally vacated should be deprived of his lien, if he ultimately reverses the order which set aside his judgment; unless the equities of bona fide purchasers or incumbrancers intervene.

Had a formal record been made, upon the reversal of the judgment, it would have directed "that the plaintiff be restored to all things which he had lost thereby," i. e. the judgment recovered. To give full effect to this direction the lien must be restored, when it can be done without prejudice to those parties. And it has never been supposed that a judgment creditor by adverse proceedings was a party having an equity to protect, in such cases. The judgment of Foote must be held to have the prior lien upon the surplus; and as it is large enough to swallow up the whole, that judgment is entitled to the whole surplus. The order of the special term is therefore reversed.

[NEW YORK GENERAL TERM, December 22, 1859. *Roosevelt, Sutherland and Mullin*, Justices.]

**SHERMAN & McCABE vs. FREEM, survivor. &c.**

Where individuals take a steamboat from the general owner, and agree to pay the persons employed in navigating her, and the expenses of running the boat, they are the owners, for the time, and responsible for negligence in her navigation.

So, if they receive the price of passage, freight, &c., and have the direction and control of the boat.

If they, by their contract, charter the boat generally, they are owners, in respect to liability for negligence in running her. If the contract is one of affreightment, merely, they are not such owners.

Where the owner of a steamboat, which is disabled so that she cannot make her trip, hires another boat in her place, to take her tows, freight and passengers to a designated point, the officers and crew of the latter boat remaining in the exclusive control of her, during that trip, and being paid therefor, by her general owner, the contract is not a contract of affreightment.

If the charterers employ the officers and hands, and are legally responsible to them for their wages, the charterers have the control of the steamboat, and are liable as owners, &c. in the absence of evidence of some special arrangement securing the boat to others.

In case of a collision, the crew of the injured vessel are not bound to remain on board, unless it is entirely plain that they can do so with safety, and there is good reason to suppose the vessel can be saved. If such circumstances exist, however, leaving the vessel is gross negligence.

Unless such crew grossly err in judgment, in abandoning the injured vessel soon after the collision, the owners of the vessel in fault will not be thereby exonerated from liability for the loss occasioned by the collision.

**A** PPEAL from a judgment entered on the verdict of a jury, after a trial at the circuit. The action was brought to recover the damages sustained by the plaintiffs by reason of a collision, on the Hudson river, between the steamboat Delaware and a sloop, the cargo of which was owned by the plaintiffs. The sloop was sunk, by the collision, and the cargo of bricks lost. As soon as the sloop struck, her crew, without waiting to ascertain the injury, in alarm jumped on board the steamer, and remained there. The sloop, after the desertion by her crew, remained afloat from 20 to 30 minutes before she sunk. The defendants insisted that if the crew had not abandoned her, she could have been run ashore on the mud flats, and saved, with her cargo. The steamer Delaware was

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then owned by Reuben Smith, who appointed and paid her officers and crew for that voyage. The defendants Fream and Mabey then owned the steamer Robert L. Stevens, which, being disabled, the Delaware was hired in her place to take her tows, freight and passengers to Saugerties. The officers and crew of the Delaware remained in exclusive control on that trip, and were paid therefor by Smith.

At the close of the testimony, the justice charged the jury that two general questions were submitted to them :

*First.* Did the injury alleged arise from negligence or misconduct on the part of those navigating the steamboat ?

*Second.* Were the defendants responsible for such negligence or misconduct, if it existed ? That two persons cannot be responsible at the same time ; it must be either the general owner or the charterer, the one or the other, and not both. And whether it be the one or the other, depends on which had the control of the steamboat at the time of the injury. If Smith, the general owner, then had the control, he was responsible. If Fream, the charterer, on the other hand, had that control, then he was responsible. That in order to recover, the plaintiff must prove that the defendants were the owners at the time of the injury, or, in other words, that they then had such control and management of the steamboat Delaware, so as to constitute them owners for the time being. That if the defendants took such steamboat from the general owner at a fixed price for the boat, and employed and agreed to pay the persons engaged in navigating her, and the expenses of running the boat, they were the owners for the time, and were responsible for the injury, if occasioned by negligence or misconduct in the navigation of the steamboat. To which the counsel for the defendants excepted. The judge further charged the jury, that if the defendants received the price of passage, freight and towage, for that trip, and had the direction and control of the vessel, they were thereby in judgment of law owners of the Delaware for that trip, and responsible in this action. That if the contract between the parties

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for the use of the steamboat was a charter of the boat, the defendants were owners; if a contract of affreightment merely, they were not owners. That it was clear that the contract in question was not a contract of affreightment. That if the defendants employed the officers and hands, and were legally responsible to them for their wages, then the defendants had the control of the steamboat, and were liable as owners; and this was a question submitted to the jury for their determination. To these portions of the charge the counsel for the defendants also excepted. The counsel for the defendants requested his honor to charge the jury as follows: That if the defendants hired the Delaware, with her officers and men, and were responsible to the general owner for the pay of her officers and men, and not to those officers and men themselves, the steamboat was so under the control of the general owner, and he alone was responsible for the misconduct of her crew. But the judge refused so to charge, or to charge otherwise than he had already charged; to which refusal the counsel for the defendants excepted. The judge further charged, that it would be holding the crew of the sloop to too rigid a rule, to require them to judge, under such circumstances as are here presented, whether there was danger in remaining on board of the sloop to take care of her, and hold them responsible for an error in such a judgment. They must have been guilty of gross error in their judgment, and a gross mistake in abandoning her, in order to visit the loss upon the owners. To this part of the charge the defendants' counsel also excepted. The jury found a verdict for the plaintiffs for the full amount claimed, being the sum of \$489.50; and thereupon the presiding justice ordered that judgment should be entered on such verdict, but that all other proceedings of the plaintiffs should be stayed, with time for the defendants to make and serve a case and exceptions; and further ordered, that such case and exceptions should be heard in the first instance, on appeal from such judgment, at the general term.

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*Robert Dodge*, for the appellant.

*James M. Smith*, for the respondents.

*By the Court*, T. R. STRONG, J. The questions of fact in this case must, on the appeal, be regarded as settled by the verdict. An appeal upon the facts lies only when the trial was by the court or referees, and not when the trial was, as in this case, by jury.

I think the objection to the question to the witness McAlister was properly sustained. It was not a question in the case whether generally, in case of danger to a vessel of collision with a steamboat, which could be avoided by luffing, it would be proper for the vessel to keep her course or luff. Besides, the law determines what is proper in such cases, and it is not a subject of inquiry by evidence. The inquiry should have been, what would have been proper under such circumstances as were disclosed in the case?

None of the exceptions to the charge are, in my opinion, well taken.

If the defendants took the steamboat from the general owner, and agreed to pay the persons employed in navigating her, and the expenses of running the boat, they were the owners for the time, and responsible for negligence in her navigation.

So, if they received the price of passage, freight, &c., and had the direction and control of the boat.

If the defendants by their contract chartered the boat generally, they were owners in respect to liability for negligence in running her.

If the contract was one of affreightment merely, they were not such owners.

The evidence, I think, warranted the opinion expressed by the judge, that the contract was not a contract of affreightment. It cannot be insisted that this question should have been submitted to the jury, as that was not requested at the trial.

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If the defendants employed the officers and hands, and were legally responsible to them for their wages, the defendants had the control of the steamboat, and were liable as owners, &c., in the absence of evidence of some special arrangement securing the control of the boat to others, and there is no such evidence in the case.

Unless the crew of the vessel struck by the steamboat grossly erred in judgment in leaving her soon after the collision, I think the defendants are not thereby exonerated from liability for the entire loss, although the vessel floated thirty or forty minutes after the collision, before it sunk, and might have been run on shore. The crew were not bound to remain on the vessel unless it was entirely plain they could do so with safety, and there was good reason to suppose the vessel could be saved. If such circumstances existed, leaving the vessel was gross negligence.

The request to charge was, I think, properly declined. It would not follow, if the defendants hired the steamboat, and were responsible to the general owner for the pay of the officers and men, and not to the officers and men themselves, that the general owner had the control of the boat. If such was the contract, the defendants might have taken and retained such control, and there is evidence tending to prove that they did so.

My conclusion is that the judgment should be affirmed.

Judgment affirmed.

[NEW YORK GENERAL TERM, December 23, 1859. *Roosevelt, T. R. Strong* and *Sutherland*, Justices.]

DE GROOT *vs.* JAY and another.

A receiver is an officer of the court, and by the well settled practice, permission of the court is necessary, to warrant an action against him.

This rule is essential for the protection of receivers against unnecessary and oppressive litigation, and should be carefully maintained.

It is a contempt of the court, to sue a receiver without such permission, and the proceedings in an action brought against him without leave may be stayed, or set aside, on motion or petition.

**A**PPEAL from an order made at a special term, denying a motion on the part of the defendants for a stay of proceedings in the action.

*Charles E. Whitehead*, for the plaintiff.

*E. W. Dodge*, for the appellant.

*By the Court*, T. R. STRONG, J. The defendant Jay is the receiver, appointed by this court, of the Mechanics' Fire Insurance Company, an insolvent corporation; and the other defendant is, under an order of the court, the attorney of said receiver. The plaintiff is a creditor of the company, and has brought this action to have the defendants enjoined from enforcing two judgments, one against him alone, and the other against him and another person, in two foreclosure suits, and to have the judgments set aside, and also for general relief; under which general prayer he asks to have the receiver restrained from applying the funds of the company towards paying a particular claim. The defendants applied to the court at special term, upon petition and other papers, for a stay of proceedings in the action, which was denied, and the case is now before the court on appeal from that order. It does not appear that leave of the court was obtained for bringing the action, and it was assumed on the argument of the appeal that such leave was not applied for or given. The action could not regularly be brought without such leave, and might properly have been set aside or stayed, because it was not

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*De Groot v. Jay.*

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specially authorized by the court. The receiver is an officer of the court, and by the well settled practice, permission of the court was necessary to warrant an action against him. This rule is essential for the protection of receivers against unnecessary and oppressive litigation, and should be carefully maintained. It is a contempt of the court to sue a receiver without such permission. In most cases of claims against a receiver, or the fund or property in his hands, the remedy by special motion is adequate. Any person having such a claim may resort to this summary remedy. The fund or property being held by the court, by its receiver, in trust for those entitled to it, or to be paid out of it, the court may administer justice to claimants without suit, upon special application. In the present case, all the relief sought, to which the plaintiff is entitled, might be obtained in that mode. And that mode is commended by considerations of economy as well as expedition. The costs of a motion are usually small in comparison with the costs of an action. Looking at the number and history of the litigations commenced by and in behalf of the plaintiff against this receiver, in connection with the other facts pertinent to the motion, we are satisfied that the order applied for by the defendants should have been granted.

It was not made a point by the counsel for the respondent, that the decision denying the relief asked was not reviewable by appeal, but the appeal was dismissed and submitted on its merits only. We do not feel called upon to raise that question.

The result therefore is, that the order appealed from must be reversed, and the motion to stay proceedings granted, without costs.

[NEW YORK GENERAL TERM, December 23, 1859. *Roosevelt, Sutherland and T. R. Strong*, Justices.]

## LATIMER vs. WHEELER.

The term "subsequent," in the 8d section of the act requiring mortgages of personal property to be filed, &c. (*Laws of 1833, p. 402,*) means after the time for re-filing has elapsed.

The omission to re-file a mortgage of that kind before the expiration of the year from its execution, will not render it invalid as against a subsequent mortgagee holding a mortgage upon the same property, executed within the year.

The defendant, being the owner of a hotel, and holding a mortgage upon the furniture therein, which was junior in date to one executed to the plaintiff, gave possession of the house and furniture to C., with strict instructions not to let any thing be taken away, because it was assigned to him. On the furniture being demanded, by the plaintiff, under his mortgage, of the defendant, in the presence of C., the defendant claimed that the goods were his, and refused to give them up; C. not interfering, but remaining entirely passive. In an action by the plaintiff, against the defendant, for the recovery and delivery of the furniture; *Held* that this was evidence to be submitted to the jury, upon the question whether the defendant had the possession, at the time of the demand, or not.

And that if the jury found that at the time of the demand and refusal the defendant had the possession of the goods, the plaintiff was entitled to recover; notwithstanding that up to the time of such demand and refusal, the actual possession might have been in C.

**A** PPEAL from a judgment of the city court of Brooklyn. The action was brought for the recovery and delivery of personal property. The jury found a verdict in favor of the plaintiff, and assessed the value of the property at \$277.95. Judgment being entered for that sum, with interest and costs, the defendant appealed.

*S. D. Lewis*, for the appellant.

*Ingraham, Underhill & Reynolds*, for the plaintiff.

*By the Court*, BROWN, J. This is an appeal from a judgment rendered in the city court of Brooklyn. The action was brought for the recovery and delivery of personal property which originally belonged to one Benjamin Rathbun, proprietor of the Globe Hotel, Brooklyn. The parties, plaintiff and

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Latimer v. Wheeler.

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defendant, were each of them mortgagees of the property in dispute. The mortgage of the plaintiff was executed by Rathbun in January, 1856, and that of the defendant on the 4th day of February, 1856. Both were bona fide made to secure just debts, and both were duly filed in the office of the register of the county, but the mortgage of the plaintiff was not renewed after the expiration of the year. The defendant, however, had personal notice of the existence and lien of the plaintiff's mortgage before the 5th July, 1856. The action was commenced on the 25th March, 1857, and the possession of the goods was demanded from the defendant in March, 1857, which the defendant refused to deliver. The defendant's mortgage was duly renewed before the expiration of the year from the time it was given, so as to perpetuate the lien.

So far as the parties to this action are concerned, the plaintiff suffers no detriment from the omission to renew his mortgage by re-filing the same with a statement of the amount due, within the 30 days before the expiration of the year from the filing thereof. The defendant's mortgage was given and filed within the year after the giving and filing of the plaintiff's, and he therefore had due notice of the plaintiff's lien. The case of *Meech and another v. Patchin*, (4 Kern. 71,) determines that the term "subsequent," in the 3d section of the act requiring mortgages of personal property to be filed, &c. (*Laws of 1833, p. 402,*) means after the time of re-filing has elapsed.

The chattels in question were a part of the furniture of the Globe Hotel, of which the defendant was the owner, and one Horatio P. Carr was the tenant. Carr testified that the defendant had given him possession of the house and furniture with strict instructions not to let any thing go; not to let Mr. Rathbun or any one else take any thing from the hotel, because it was assigned to him. Michael Carey, a witness for the plaintiff, testified: "He was in the employ of the plaintiff; went to the Globe Hotel with a copy of the mortgage, at the plaintiff's request; saw Mr. Wheeler and Mr. Carr

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Latimer v. Wheeler.

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there. It was a few days before the suit was commenced. I opened the mortgage and told him Mr. Latimer sent me for the goods mentioned in the mortgage. He said there were no goods there belonging to Mr. Latimer. He said they were his, and neither I nor Mr. Latimer could have them. I told him I would see who they belonged to, and he told me to clear out." At this time the defendant was a boarder in the house. This presents the only remaining question in the cause. Replevin in the detinet will lie whenever trover may be maintained, and trover may be maintained wherever the defendant assumes the control of the goods and withholds them from the true owner. Up to the time of the demand by Cary, the evidence does not show such a possession in the defendant as would render him liable. Carr, to whom he had let the hotel, with an agreement to assign to him the furniture, upon the payment by Carr of certain moneys specified in the agreement, would, up to the time of the demand, have been deemed to have the actual possession. But considering that the defendant's title was that of mortgagee; that he had put Carr in the possession, with directions to suffer no part of the property to be removed; that Carr was present when Cary produced the plaintiff's mortgage and demanded the goods; the defendant's claim to them as his own property, and his refusal to allow the plaintiff's agent to remove them, was certainly evidence to be submitted to the jury upon the question whether the defendant had the possession, at the time of the demand, or not. In this view, alone, the case was submitted to the jury by the judge, upon the trial, and I do not think the defendant's exception to this part of the charge well taken. Carr was present when the demand was made of the goods. He did not interfere. He made no objection, but remained entirely passive while his landlord claimed the goods as his own property, and refused the plaintiff's agent permission to remove them. There is every reason to infer that, but for the defendant's interference, the plaintiff would have obtained the goods. After all this he should not be defeated in his recov-

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HILL v. McReynolds.

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ery, upon the sole ground that the defendant had not the possession at the time of the demand.

The defendant asked the judge to charge the jury that, if they believed Carr was in the actual possession, this action could not be maintained. The judge declined, and the defendant excepted. The court had just charged the converse of this proposition, and told them that if they believed the evidence to which I have referred, they were at liberty to find the defendant had such a legal possession as would enable the plaintiff to maintain the action. After this explicit direction, the defendant should have limited his request to the time when the plaintiff's agent made the demand, and the defendant the refusal, because, up to that time, as I have already said, the actual possession may have been in Carr, and still the plaintiff entitled to recover. Carr, at that time, was not the owner, but held the property for the defendant.

The judgment should be affirmed.

[KINGS GENERAL TERM, December 12, 1859. *Lott, Emott and Brown*, Justices.]

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HILL vs. McREYNOLDS and others.

The referee, in a mortgage case, determined all the issues made by the answer of the defendants who had appeared, against them, and no further trial, as to them, could be had. The plaintiff—not being able to file the report of the referee and enter up judgment, because there were other defendants upon the record who had not submitted to the reference, and who had not appeared in the cause, and because the report did not show the exact sum due—gave notice of an application to the court, at special term, for the relief demanded in the complaint. The defendants did not appear, to oppose the motion, and the court made an order referring it to a referee to compute the amount due. Upon the report of the referee, showing the amount due as against all the defendants, the plaintiff, on a notice of ten days, brought the cause to a hearing, and obtained a final judgment for foreclosure and sale. *Held*, that this practice was entirely regular.

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Hill v. McReynolds.

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**A** PPEALS from an order made at a special term on the 23d of May, 1859, referring the cause to G. M. Stevens, the clerk, to compute the amount due the plaintiff, on his mortgage; also from an order made on the 13th of July, 1859, denying the motion of the defendants to set aside that order of reference. The defendants also appealed from the final judgment for foreclosure and sale, made on the 13th day of July, 1859.

*Mann & Rodman*, for the plaintiff.

*W. H. Taggard*, for the defendants.

*By the Court*, BROWN, J. The bond was made payable on the 18th of August, 1860, with the interest semi-annually, coupled with this provision: "That should default be made in the payment of the interest, or any part thereof, on any day payable, and should the same remain unpaid and in arrear for the space of thirty days, then the principal sum and all arrearages of interest should, at the option of the obligee, become due and payable immediately thereafter." The defendants Gage, Sloan and Dater purchased the mortgaged premises subject to the mortgage, and of course subject also to this condition of the bond.

The answer of those defendants set up, as the only defense, an agreement by Hill to send to their place of business for the interest on the mortgage whenever it should accrue; and the omission of Hill so to do, together with a tender of the interest after the commencement of the action, and before Gage, Dater and Sloan were made parties, the same having been commenced originally against Reynolds and wife alone.

The cause was referred, by the consent of the parties who appeared, to J. N. Taylor, referee, to hear and determine the same. He heard the cause upon the proofs, and the fact of the agreement was proved by the witness, Mr. Taggard, and disproved by the testimony of the plaintiff, John S. Hill.

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The referee found against the defendants upon both the questions raised by the answer.

If the parol agreement to demand the interest from the purchasers Gage, Dater and Sloan, made as it was said to be without any consideration, could be regarded as a binding obligation on the part of the plaintiff, still the proof of its existence was conflicting, and the judgment of the referee is not open to review. In regard therefore to the appeal from the judgment, it must, upon the most obvious principles, be affirmed.

The appeals from the order of the special term of the 23d May, and of the 13th July, 1859, are not tenable.

The referee had determined all the issues made by the answer of the defendants who had appeared, against them. No further trial, as to them, could be had. Yet the plaintiff could not file his report and enter up his judgment, because there were other defendants upon the record who had not submitted to the reference, and who had not appeared in the action, and because the report of the referee did not show the exact sum due. The plaintiff, therefore, gave notice of an application for the relief demanded in the complaint. It was not a notice of trial, but a notice of the motion. The defendants did not appear, to oppose the motion, but by their absence and silence submitted that the plaintiff was entitled to the relief asked for in the notice. The judge at the special term could not award judgment without first ascertaining the sum due. He might have computed it himself, or do the same thing on the spot, by a referee. He chose the latter course. Surely no notice of the actual computation was necessary, because the defendants already had notice that judgment would be taken for the sum mentioned in the prayer of the complaint, with the interest. This practice was entirely regular.

The orders made at the special term, from which the defendants have appealed, should be affirmed, with \$10 costs.

[KINGS GENERAL TERM, December 12, 1859. *Lott, Emott and Brown, Justices.*]

THE LA FAYETTE INSURANCE COMPANY OF BROOKLYN  
*vs.* ROGERS.

A corporation, when suing, need not aver or prove its corporate existence, upon the trial, unless it be expressly pleaded that it is not a corporation.

In an action upon a specialty, by the obligee therein named, if the complaint avers that on, &c. "the defendant made his certain bond or obligation in writing, sealed with his seal, and in the words and figures following"—giving a copy of the instrument—and avers that the defendant has not paid the sum therein mentioned, or any part thereof, and that the whole amount thereof is still due and unpaid, this is sufficient, without any averment of a *delivery*.

**A** PPEAL from an order made at chambers, overruling a demurrer to the complaint as frivolous, and ordering judgment for the plaintiffs.

*P. S. Crooke*, for the plaintiffs.

*H. C. Wright*, for the defendant.

*By the Court*, BROWN, J. This action is brought to recover the amount due upon a bond duly executed, under seal, by the defendant, to the plaintiffs, by their corporate name of The La Fayette Insurance Company of Brooklyn, and which is set out *in hæc verba* in the plaintiffs' complaint. The defendant demurred, and assigned two grounds: 1st. That it appeared on the face of the complaint that the plaintiffs had not legal capacity to sue, in omitting to recite the act or acts of incorporation, nor the proceedings under which the plaintiffs were alleged to have been organized, nor the substance thereof; nor did it recite the title of such act or acts, or the day of the passage of the same; and 2d. That the complaint did not state facts sufficient to constitute a cause of action. Mr. Justice Lott, sitting at chambers, overruled the demurrer as frivolous, and ordered judgment for the plaintiffs; from which the defendant appealed to the general term.

If the question raised and presented by the first ground of

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*The La Fayette Ins. Co. of Brooklyn v. Rogers.*

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demurrer was a novel one, it would be a reasonable duty to the appealing party to examine it upon principle and authority. But it is not novel. It has been repeatedly examined and determined against the demurrer, both in this state and in England, and must be regarded as entirely settled. The latest authority is that of *The Bank of Waterville, and West Winfield Bank v. Beltser*, (13 How. Pr. Rep. 270.) In that case the defendant, in his answer, took the objection that the complaint did not show or refer to any law incorporating the plaintiffs, or under which they were organized. Mr. Justice Emott, who heard the argument, treated this part of the answer as a demurrer. He examined the subject at great length, and delivered a well considered opinion. He referred to numerous authorities, from the time of Lord Raymond to the present day, and determined that a corporation, when suing, need not aver or prove its corporate existence, upon the trial, unless it be expressly pleaded that it is not a corporation. In that conclusion we concur.

The next objection to the complaint, covered by the second ground of demurrer, is the omission to aver a delivery of the bond to the plaintiffs, and in not showing any title thereto in them. This ground is equally untenable with the first. The instrument declared upon is a specialty—an instrument under the hand and seal of the defendant, and the obligee therein named is the plaintiff in the action. The complaint avers that on the day named, the “defendant made his certain bond or obligation in writing, sealed with his seal, and in the words and figures following”—giving a copy of the instrument. It then avers that the defendant has not paid the sum in the said bond or obligation mentioned, or any part thereof, according to the terms and conditions thereof; and the whole amount thereof, with the interest from June 1st, 1858, is still due and unpaid, and demands judgment. The averment of a delivery to the plaintiff is clearly wanting. But it was not necessary. The delivery of a deed, though essential to its validity, need not be stated in the pleading. (1 *Chit. Pl.* 348.

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The La Fayette Ins. Co. of Brooklyn v. Rogers.

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1 *Saund.* 291, n. 1.) - In *Chappell v. Bissell*, (10 *How. Pr. R.* 274,) the complaint contained a copy of the note, which was payable to Chappel, the plaintiff, but did not allege a delivery; and this was the objection taken by the demurrer. Mr. Justice T. R. Strong held the complaint sufficient, both under § 162 of the code, and independent of the section. It alleges, he says, the making of the note, which includes the delivery. He cites several authorities. *Marshall v. Rockwood* (12 *How. Pr. R.* 452) presented the same question. Mr. Justice Harris held, that under § 162 of the code, when the complaint furnished a copy of the written instrument, it was not necessary to aver a delivery to the plaintiff, who is the payee. The last clause of the section is too plain to admit of any doubt, for it declares that "in an action founded upon an instrument for the payment of money only, it shall be sufficient to give a copy of the instrument, and to state that there is due to the plaintiff thereon a specified sum, which he claims." (See also *Prindle v. Caruthers*, 15 *N. Y. Rep.* 425.) These authorities are decisive. The demurrer was manifestly frivolous, for it set up objections to the complaint which were clearly untenable, and which had been repeatedly overruled in similar cases.

The judgment should be affirmed.

Judgment affirmed.

[KINGS GENERAL TERM, December 12, 1859. *Lott, Emott and Brown*, Justices.]

**JULIA PELLETREAU, appellant, vs. CORNELIA SMITH,**  
respondent.

A testator, by his will, gave and devised to his wife J. all his estate, real and personal, so long as she remained his widow; making no disposition of the estate in remainder, which accordingly descended to C. his heir at law. The personal estate proving insufficient to pay the debts, J. the executrix applied to the surrogate for authority to mortgage, lease or sell the real estate of the testator, for that purpose, and that she be allowed to sell, in the first instance, the reversionary interest of C. therein. The petitioner claimed that the estate in remainder should be first sold, and the proceeds applied to the satisfaction of the debts; or that the value of her life estate in the premises should be computed and ascertained upon the principles applicable to annuities, and deducted from the proceeds of the sale, and the residue applied to the satisfaction of the debts, before any part of the ascertained value of the petitioner's life estate should be appropriated to that object. The surrogate made a decree authorizing a sale of the land, and directed that the proceeds be applied to the payment of the debts; taking no notice of, and giving no preference to, the estate of J. as tenant for life, over that of C. in remainder.

*Held* that the rule of distribution contended for by J. was inconsistent with the directions of the statute; and that the decree of the surrogate was right.

**A** PPEAL from an order of the surrogate of the county of Suffolk. The facts are stated in the opinion of the court.

*George Miller*, for the appellant.

*W. P. Buffett*, for the respondent.

*By the Court*, BROWN, J. This is an appeal from an order or decree of the surrogate of the county of Suffolk directing the sale of certain lands, whereof Henry Pelletreau died seised, and the application of the proceeds to the payment of his debts. The proceedings were instituted by the appellant, who is the executrix and also the devisee of the testator. By the will he gives and devises to his wife, the appellant, all his estate, both real and personal, so long as she remains his widow, and makes no disposition of the estate in remainder, which accordingly descends to the respondent, Cornelia Smith, his heir at law. The personal estate proved insufficient to pay the debts,

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Pelletreau v. Smith.

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and hence these proceedings to sell the lands. The surrogate made the usual decree, and adjudged that the proceeds be applied to the payment of the debts, taking no notice of, and giving no preference to, the estate of the tenant for life over that of the person entitled to the estate in remainder.

The appellant contends that the estate in remainder should be first sold and the proceeds applied to the satisfaction of the debts in the first instance; or that the value of the petitioner's life estate in the premises should be computed and ascertained upon the principles applicable to annuities, and deducted from the proceeds of the sale, and the residue applied to the satisfaction of the debts, before any part of the ascertained value of the petitioner's life estate is appropriated to that object. This is quite an ingenious theory, and one strictly consonant to justice and equity, for it is apparent that the testator intended the devisee for life should be the principal and primary object of his bounty. This, however, is not a proceeding where the various estates and interests which might be carved out of the entire fee can be recognized and adjusted upon equitable principles. The authority of the surrogate is derived solely from the statute concerning the powers and duties of executors and administrators, in relation to the sale and disposition of the real estate of their testator or intestate, and its directions must be rigorously observed. His authority is limited to making an order or decree to mortgage, lease or sell so much of the real estate of the testator or intestate as shall be necessary to pay his debts. It is the real estate of the deceased which is to be leased, mortgaged or sold, and not any particular estate (such as an estate for years, for life, or in remainder) therein which he may have devised to another, that is to be sold. The act is not susceptible of execution upon any theory short of a mortgage, lease or sale of the entire estate of the testator at the time of his death. If the money needed to pay the debts "can be raised by mortgaging or leasing the real property of the deceased," the surrogate shall direct such mortgage or lease to be made for that pur-

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Pelletreau v. Smith.

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pose. (2 B. S. 102, § 15.) And section 16 directs that "no such lease shall be for a longer time than until the youngest person interested in the real estate leased shall become 21 years of age." A mortgage upon an estate in remainder might possibly be the means of raising money to pay debts, but the lease of such an estate for a term of years, with a view to raise money for such an object, would certainly be a very unusual and ineffectual proceeding. The appellant relies mainly upon one of the provisions of section 20 of the act, which is, that "If it appear that any part of such real estate has been devised and not charged in such devise with the payment of debts, the surrogate shall order that the part descended to heirs be sold before that so devised, and if it appear that any lands devised or descended have been sold by the heirs or devisees, then the lands remaining in their hands unsold shall be ordered to be first sold; and in no case shall land devised expressly charged with the payment of debts be sold under any order of the surrogate." It will be observed, that in this section the words "real estate and lands" are used as synonymous terms, to designate the real property of the testator; and the sole purpose of the provision is to direct and insure the appropriation of the undevised lands of the testator, and the lands not alienated by his heirs or devisees, to the payment of the debts of the deceased, before resort can be had to any other lands of which he died seised or possessed. The term "real estate" is not defined in the act which regulates these proceedings; but in the 10th section of title 5 of chapter 1 of part 2d of the revised statutes, the terms "real estate" and "lands," as used in the chapter, shall be construed as coextensive in meaning with lands, tenements and hereditaments. And this I take to be the true signification of the term as used in the act under consideration.

Nor do I think the surrogate authorized to set apart the estimated value of the appellant's life estate from the proceeds of the sales, and apply what may remain to the payment of the debts of the deceased, before appropriating any part of

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Pelletreau v. Smith.

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such estimated value to that object; because the statute in express terms directs what shall be done with the proceeds, and the manner in which the only life estate recognized therein shall be secured. Section 32 declares that every sale and conveyance made pursuant to the provisions of the title, shall be subject to all charges by judgment, mortgage or otherwise upon the lands so sold, existing at the time of the death of the testator or intestate. Sections 36 and 37 directs that the surrogate shall in the first place pay out of the proceeds of the sales the charges and expenses thereof. He shall next satisfy any claim of dower which the widow of the testator or intestate may have upon the land sold, by the payment of a sum in gross, or by investing one third part of such proceeds for the benefit of such widow during life. He shall then, by direction of the succeeding sections, apply the residue to the payment of the debts of the deceased, distributing the residue (if any) amongst the heirs and devisees of the testator or intestate, or the persons claiming under them, in proportion to their respective rights in the premises sold. These directions are plain and explicit, and must be observed. And they are utterly inconsistent with the rule of distribution contended for by the appellant.

For these reasons I think the decree of the surrogate should be affirmed, with costs.

[KINGS GENERAL TERM, December 12, 1859. *Lott, Emott and Brown, Justices.*]

## MARY ELLIOTT vs. THOMAS GIBBONS.

An acting administrator was appointed general guardian of the infant children of the intestate, and he and the widow and children resided together, as one family, in the dwelling house formerly owned by the testator; and he subsequently married one of the infant children and continued to reside there, with his wife. He advanced the means, from time to time, and paid the expenses incurred in the support of the family. At three several times, as general guardian of the infants, he obtained orders from the county court, for the sale of the lands which had descended to his wards, from their father, and in which the widow had an estate in dower, the proceeds of which sales, including the widow's share, for her dower interest, went into his hands. In an action brought against the administrator and guardian, by the widow, to recover a compensation for her dower interest; *Held*, that under these circumstances the law would not imply a promise on the part of the widow to repay to the guardian the money thus furnished or expended by him, in support of the family; but that on the contrary, the legal inference was, the money was furnished and advanced by him as *guardian*, and not as *creditor of the widow*.

Accordingly *held*, that the moneys thus advanced by the guardian could not be set off or allowed as a counter-claim, in such action, against the widow's claim for dower.

**A** PPEAL from a judgment entered in favor of the plaintiff, upon the report of a referee, for \$2840.89, besides costs; that being the balance of the plaintiff's claim after deducting a counter-claim of \$105 and interest, allowed to the defendant. The rest of the defendant's counter-claim was disallowed.

*P. S. Crooke*, for the plaintiff.

*S. M. & D. E. Meeker*, for the defendant.

*By the Court*, BROWN, J. This action is brought by the plaintiff to recover certain moneys, the consideration and compensation for her dower in lands whereof John H. Elliott, her late husband, died seized, in the county of Kings. Her right to the moneys, and the fact that the defendant had received and was liable for them, primarily, was not denied in the an-

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swer. The real subject of litigation is the set off or counter-claim of the defendant.

John H. Elliott died on the 25th July, 1855, and the plaintiff, Mary Elliott, Thomas Gibbons, and one Henry G. Law became his administratrix and administrators. The defendant took charge of the settlement of the estate and did most of the business. There were six infant children of the deceased, for whom the defendant was appointed general guardian. The widow and the children continued to reside in the house of which the deceased was owner at the time of his death; and a few months after this event the defendant became an inmate of the family, residing with his wards and the widow as one family. In a few months he married one of the infants, and until some time after her death, which occurred some eight months after the marriage, there was no change in the family. He advanced the means, from time to time, and paid the expenses incurred; sometimes paying the money into the hands of the plaintiff directly, and at other times paying for and furnishing the articles needed for its support. The offset or counter-claim consists of charges and items for the moneys thus paid, and the expenses incurred.

At three several times the defendant, as the general guardian of these infants, obtained orders from the county court of Kings for the sale of the lands which had descended to his wards from their father John H. Elliott, and in which the plaintiff, as his widow, had the estate in dower to which I have referred. The sales were consummated, and she released her dower, in accordance with the order of the county court; her dower being estimated in the three parcels to be of the value of \$2770.62. These proceedings were had upon the petition of the defendant, and were consummated by the execution of the deeds of conveyance, in the years 1857 and 1858.

The personal estate of the deceased was insufficient to pay his debts, and we are left to estimate the value of the real property of the infants from the estimated value of the widow's dower. The offset claimed amounts to the sum of

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\$2665.97, which, except one item of \$105 paid for the plaintiff individually, is the sum charged as expended for the support and maintenance of the family between the 25th July, 1855, and the 15th September, 1857, a period of two years and less than two months.

The idea of appropriating the whole (or nearly the whole) of the proceeds of the widow's estate in the lands to the support and the uses of a family, of which the defendant himself and his wife for a large part of the time, and his five wards for the whole of the time, were members, is manifestly unjust upon the face of it. So long as these infant children had property of their own, the mother was under no legal obligation to support them. If there was property, (as there doubtless was in this instance,) the legal obligation was imposed upon the defendant, their general guardian. We do not see upon what ground he applied for the order to sell their lands. One of the grounds which the statute furnishes for the granting of such an order by the courts is, that the proceeds are wanted for the support and education of the infant. We may safely infer that this was the ground of the guardian's application. And when he furnished the means, from time to time, for the support of these infants, without any understanding or intimation that it was to be charged to the mother, the legal inference is that he furnished it as guardian, and not as creditor of the mother. Whatever was furnished was applied to the support of his own wife, to the support of himself for a part of the time, and to the support of his wards, over whose estate he had, and finally obtained, absolute control with the power of conversion into money. The referee could not—because the law would not—imply an assumpsit from such a state of facts. The mother may be under a legal as well as a moral obligation to contribute something to the maintenance of a family of which she was a member, and in which she was supported. But the pleadings are not framed with a view to examine and determine that question. Nor does the defendant seek in this action any such relief. I am therefore of

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opinion that the referee properly rejected all the defendant's offset, except the charge for \$105, with the interest.

On the trial, Gibbons was asked by his own counsel how much money he had received on the 15th September, 1857, from the real estate and such property as came to his hands as general guardian. The plaintiff's counsel objected, and the referee overruled the question. Under the view I have taken of the case, it was of no consequence what money was in the hands of the defendant as guardian of the children. The question still recurs, whether there was any thing in the transaction from which the law would imply a promise on the part of the mother to repay to the defendant the money furnished or expended in support of the family.

The judgment should be affirmed.

Judgment affirmed.

[KINGS GENERAL TERM, December 12, 1859. *Lott, Emott and Brown*, Justices.]

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 BRIGGS and others vs. OUTWATER and others.

By the provisions of the act of the legislature of June 18, 1853, "to provide for the establishment of union free schools," the school districts are preserved in their integrity, as divisions of the common school system of the state, and the officers thereof are still "school officers," and fall within that designation in the act of April 12, 1858, "to change the school year and to amend the statutes in relation to public instruction," which declares that the term of office of "all school district officers" theretofore elected shall expire on the 2d Tuesday of October, 1858.

Accordingly, where, in October, 1858, the inhabitants of a school district not within any incorporated city or village, established a free school therein, under the act of June 18, 1853, and elected the defendants its trustees, or board of education, who were in office on the 2d Tuesday of October, 1858, at which time the plaintiffs were duly elected trustees, under the act of April 12, 1858; *Held*, that so far as those officers were concerned, the act of June, 1853, was superseded and repealed by the provisions of the act of April 12, 1858; and that the plaintiffs were the legal trustees of the district.

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Briggs v. Outwater.

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*Held also*, that the union free school in question, not being formed from two or more adjoining school districts, the free school might still be maintained, and the plaintiffs exercise the powers and authority of its board of education.

CASE submitted for the opinion of the court, under the code of procedure, upon these facts. On the 15th of October, 1853, school district No. 1, of the town of Hyde Park, Dutchess county, was, by vote and other proceedings mentioned in the act of the legislature passed June 18, 1853, entitled "An act to provide for the establishment of union free schools," established as an union free school. William B. Outwater, James Finch and John A. Parker were the trustees of such district. The district is not within any incorporated city or village. On the second Tuesday of October, 1858, Stephen D. Briggs, Daniel Wigg and John A. Degroff were duly chosen trustees of such district, provided the act of the legislature passed April 12, 1858, entitled "An act to change the school year, and to amend the statutes in relation to public instruction" applies to said district; and the question submitted to the court was, does said act of 1858 apply to said district No. 1 of Hyde Park, such district having been established as an union school district under said act of 1853? and are the plaintiffs, or the defendants, trustees thereof?

*H. A. Nelson*, for the plaintiffs.

*I. F. Barnard*, for the defendants.

*By the Court*, BROWN, J. On the 15th of October, 1853, the inhabitants of school district No. 1, in the town of Hyde Park, established a free school therein, pursuant to the provisions of the act of June 18, 1853, to provide for the establishment of union free schools. The district is not within any incorporated city or village, and the defendants were its trustees, or board of education, at the time of the election of the plaintiffs to the office of trustees of the district, as hereafter mentioned. On the second Tuesday of October, 1858, the

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plaintiffs, Stephen D. Briggs and his associates, were duly elected trustees, in conformity with the provisions of the act to change the school year, and to amend the statutes in relation to public instruction, passed April 12, 1858. The question submitted for determination is, who are the legal officers of the district, and whether the act of June, 1853, so far as these officers are concerned, is superseded and repealed by the provisions of the act of April 12, 1858. The latter act takes no notice whatever of the former, and deals with the subject precisely as if it did not exist; and whether the last is subversive of the first, in regard to the mode of electing the district officers, or not, I think it will be found difficult, if not impossible, to reconcile the one statute with the other.

The sole purpose of the act of June 18, 1853, is to put it in the power of the inhabitants of a district, or of two or more adjoining districts, to establish free schools therein. The districts are not thereby abrogated or consolidated; but for all other purposes, except the election of separate bodies of officers when two or more unite, and the mode of conducting and maintaining their schools, they still remain school districts, and integral parts of the common school system. This, I think, is apparent by reference to section 1, which authorizes any 15 persons entitled to vote at any meeting of the inhabitants of any school district, to sign a call for a meeting to determine, by the vote of such district, whether a union free school should be established therein. The notice of the meeting is to be given by the trustees, and the expenses are a charge upon the district. To make the proceedings valid, one third of the inhabitants of the district must be present at the meeting, and if the question be determined in the affirmative, they shall proceed to the election of trustees, not less than three nor more than nine in number, who shall be divided into three several classes, to hold office for one, two and three years, and thereupon the office of any existing board of trustees shall cease. The trustees so chosen are to constitute a board of education for the district or districts for which they

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are elected. And they are to have the name and style of the board of education of district No. ...., in the town of..... (See § 5.) The powers of the board are defined in § 11, and are not materially different from the powers of the school district trustees. By the 8th subdivision, they are to possess all the powers and privileges, and be subject to all the duties, in respect to common schools or the common school departments, in any union free school in the district or districts, which the trustees of common schools possess, or are subject to, not inconsistent with the provisions of the act. These provisions show, I think, that the school districts are preserved in their integrity as divisions of the common school system of the state. And the officers, by whatever name they may be called, are still school officers, and fall within that designation in the act of the 12th April, 1858, to which I shall now more particularly refer.

This act was designed to apply generally to schools and the school system of the state. This appears by its title, which is "An act to change the school year, and to amend the statutes in relation to public instruction." Section one declares that the school year of the state shall commence, thereafter, on the first day of October and end on the 30th day of September. And all provisions of law in respect to the duties of school officers, now in force, shall apply to the year therein designated. Section three directs the annual meeting of the taxable inhabitants and legal voters of the several school districts in the state shall be held on the 2d Tuesday of October in that and each succeeding year. Section four declares that the term of office of all school district officers heretofore elected or appointed, or who may be elected or appointed previous to the 2d Tuesday of October ensuing the passage of the act, shall be deemed to expire on the said 2d Tuesday of October. Section six gives the electors of each district power at the annual district meeting (which is the time designated by the general act for election of trustees) to determine the number of trustees to be chosen, and it also fixes their term of office.

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The defendants were the trustees or board of education of district No. 1, in the town of Hyde Park, at the commencement of the school year in 1858; and they were elected previous to the second Tuesday of October in that year. They were school district officers, and nothing else. That is a general term or expression, embracing all persons exercising public trusts, within and for the school districts of the state. If the boards of education in the several districts were not school officers, what were they? To what other department of the government shall they be assigned and classed as officers, if not to that of the common schools? If the act had declared that the office of trustee—school district trustee—should expire on the second Tuesday of October, a distinction might have been made between trustees and members of the board of education. But the term used is school district officers, which must be deemed to embrace both classes, if the two classes exist. Section thirteen declares that all laws and parts of laws inconsistent with the provisions of the act are thereby repealed. So that all the provisions of the act of the 18th June, 1853, which conflict and cannot exist in harmony with the provisions of the act of April 12th, 1858, are repealed and no longer of any force.

The union free school established in district No. 1, in the town of Hyde Park, is not formed from two or more adjoining school districts; so that the effect of a construction of the act unfavorable to the rights of the defendants does not arise. Under such a determination the free school may still be maintained, and the newly elected trustees exercise the powers and authority of its board of education.

I am of opinion that judgment should be entered for the plaintiffs.

[KINGS GENERAL TERM, December 12, 1859. *Lott, Emott and Brown, Justices.*]

**MARY MARSH vs. GEORGE POTTER and Mary his wife.**

Under the code, husband and wife are competent witnesses in their own behalf, when co-plaintiffs or co-defendants; and in like cases they are also competent witnesses for each other. *ROSEKRANS, J.*, dissented.

In actions between one of them and a third person, the one is not a competent witness for or against the other.

The former law is untouched by the code, as respects confidential communications or matters between them.

**T**HIS was an action of slander, against husband and wife, for words uttered by the wife. On the trial the husband was offered as a witness generally in the cause, and in his own behalf. The plaintiff objected to his being sworn: 1st. On the ground that, being the husband of his co-defendant, he was not competent; and that the husband and wife could not be sworn and examined as witnesses for or against each other, in this action. 2d. On the ground that this was a joint action, in which no separate judgment could be rendered against either. The court sustained the objection, and held, that being the husband of his co-defendant, he was not competent as a witness in the action. The wife was then offered as a witness, for the same purpose, and in the same manner. The plaintiff interposed the same objections, which were, for the same reasons, sustained by the court. To which rulings the defendants duly excepted. The plaintiff had a verdict.

*A. McFarlan*, for the plaintiff.

*McIntyre Frazer*, for the defendants.

**JAMES, J.** As this action was for the tort of the wife, not committed in the presence of the husband, the two were necessarily made parties to the suit. (2 *Kent's Com.* 149.) If the plaintiff obtains judgment, execution may issue against both defendants, as both are judgment debtors, (*Code*, §§ 283, 286, 289,) and it may be satisfied out of the property of the husband, or the separate property of the wife. (*Code*, 289.

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*Hood v. Mathews*, 2 Dowl. P. C. 149. 1 *Tidd's Pr.* 194, 9th ed.) If returned unsatisfied, both, or either, may be taken in execution against the body. (Code, §§ 288, 179. *Pitt v. Meller*, 2 *Strange*, 1167. *Finch v. Duddin*, *Id.* 1237. *Langstaff v. Rain*, 1 *Will.* 149. *Anonymous*, 3 *id.* 124. *Newton v. Brodle*, 9 *Adol. & Ellis*, 948.)

The main question presented by the case is, whether, when husband and wife are parties defendants, they are competent witnesses in the cause, in their own behalf, or for each other.

The question, however, may be discussed in its broad sense as one of general evidence—whether married persons, when properly parties to actions, are competent witnesses? The letter of the statute extends to married persons, whether they be co-plaintiffs, co-defendants, or the action be between themselves.

Upon the competency of witnesses the common law proceeded in distrust of human nature; it believed a witness, if interested, to be incapable of verity, (1 *Phil. Ev.* 46;) and there consequently grew up under it a system of restrictions which rarely, if ever, allowed the facts in a given case to come out fully, and was often the occasion of great hardship and injustice. The objections to such a system were too manifest to escape attention. Many thought the attainment of truth would be best promoted by opening every source of information in a given case, and that all persons cognizant of any facts bearing upon the case, and especially those ordinarily most conversant with them, the parties themselves, should be permitted to speak. They expressed confidence in man, and a belief in the existence of human integrity. They believed in the capacity of human nature, although interested, to speak the truth, and in the ability of triers of questions of fact to detect falsehood.

From such a basis of thought there have sprung up, within a few years past, in England, and in some of the states of this country, radical changes in the admissibility and competency of persons as witnesses. A new system has developed itself,

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whose foundations are laid in common sense and an enlightened policy ; and its superiority over the old is no longer questioned, except by the few who have no confidence in the present, no hope in the future, and who deem our only safety is in keeping fast anchored to the past.

In those countries which have introduced the new system, the courts have usually most heartily co-operated in the movement. In England, Lord Denman, Lord Brougham and Lord Campbell, while on the bench, introduced into parliament the several acts which have wrought such radical changes in the law of evidence, that scarcely a vestige of the common law, in regard to competency, remains. Shall our courts hesitate to follow such eminent jurists, or refuse to give to the enlightened legislation of this state that liberal construction which will lead to a similar result ?

Actions between married persons should constitute no exception to the general rule of practice. Such suits represent well defined rights of action, both as concerns property and personal rights. Suitors can institute them, courts must entertain them, and triers must decide them. So in actions where husband and wife are co-plaintiffs or co-defendants, husband and wife may sue and can be sued ; and the husband *must* in some instances be sued with the wife. Such actions must be entertained and tried by the courts. The simple question then is, *shall* such actions be tried in the ordinary way, or by some exceptional method ? Will the law, while it entertains them, say that they shall be decided rightly, so far as practicable, or that it is a matter of no consequence how they are disposed of ? Or if their decision is a matter of some concern to the law, shall the means most approved for arriving at a result consonant with the dignity of the law and the rights of individuals in other cases, be employed in these actions ? Or shall the triers be left to grope their way through a partial darkness to a conclusion ? In other words, shall the husband's mouth be closed in his own behalf, when

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his wife is a co-party, although permitted to speak, if sued alone?

It is a rule of the common law that husband and wife cannot be witnesses for or against each other. The first branch is based entirely upon *interest*; the second upon *interest and public policy*. All persons *interested* in the action were, at common law, held incompetent to testify therein. This, of course, excluded the parties to the record. At common law the wife's civil existence was merged in that of her husband, and the two were regarded as but one person; she had no separate right of property or of action; and hence was excluded from being a witness in her husband's *behalf*. This identity of interest was also the real support of the rule excluding the wife as a witness against the husband. "In consequence of this identity of *interest*, husband and wife uniformly appeared before the court in a friendly attitude. Legally, their relation was one of mutual confidence and harmony. There was every reason to fear, therefore, that in the event of the introduction of one of them at the suit of an adversary of the other, some testimony would be elicited which would be detrimental to the interest of the other, and therefrom domestic ill feeling and discord result." The peace of families would thus be jeopardized, merely to subserve the pecuniary interests of third persons.

That this is the true rationale of the rule, every statement of its *reasons* which can be found in the books will show.

Baron *Gilbert*, in his work on *Evidence*, (page 252,) says: "If they (husband and wife) swear *for* each other, they are not believed, because their interests are absolutely the same, and, therefore, they can gain no more credit when they attest *for* each other, than when a man attests for himself. And it would be very hard if a wife should be allowed as evidence *against* her husband, when she cannot attest *for* him. Such a law would occasion implacable quarrels and divisions, and destroy the very legal policy of marriage."

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*Peake*, in his work on *Evidence*, (page 173,) states the reasons of this rule in the same manner, substantially.

In *Taylor on Evidence*, (page 878,) it is laid down thus: "They cannot be witnesses *for* each other, because their interests are identical; neither can they testify against each other, because the admission of such testimony would lead to dissension and unhappiness, and possibly to perjury."

*Phillips* says: "The reason for excluding husband and wife from giving evidence for or against each other, is founded partly on the identity of interest, and partly on the principle of public policy, which deems it necessary to guard the security and confidence of private life even at the risk of an occasional failure of justice. They cannot be witnesses for each other, because their *interests* are absolutely the same; they are not witnesses against each other, because this is inconsistent with the relation of marriage."

*Starkie*, in his work on *Evidence*, (vol. 2, p. 706,) says of the rule, "it is founded partly on the identity of *interest* in these persons, and partly on the grounds of public policy, for fear of creating distrust and dissensions between them, occasioning perjury."

*Greenleaf* uses almost the same language, (vol. 1, § 334.)

The rule is laid down in *Butler's Nisi Prius*, (page 286,) thus: "Husband and wife cannot be admitted to be witnesses for each other, because their *interests* are absolutely the same; nor *against* each other, because contrary to the legal policy of marriage."

In *Blackstone's Commentaries*, (vol. 1, p. 443,) it is said that husband and wife "are not allowed to be evidence *for* or *against* each other, partly because it is impossible that their testimony should be indifferent, but principally because of the union of persons, and, therefore, if they were admitted to be witnesses *for* each other, they would contradict one maxim of law, 'no one should be a witness in his own cause;' and, if against each other, they would contradict another maxim, 'no one is obliged to criminate himself.'"

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I think it clear, therefore, that the true principle which excluded the husband or the wife of the party from being a witness *for* or *against* each other, was the union of *interest* and *privilege* existing between them.

It is true, authorities can be cited which state that it is with a view of preserving the peace of families, and where it is said that the admission of such testimony would lead to dissension and unhappiness, and probably to perjury, and that the confidence existing between husband and wife should be sacredly cherished; but if those cases are carefully examined it will be found that this question, in its origin and cause, was not fully considered.

As was said by Earle, J., in *Stapleton v. Croft*, (10 *Eng. Law and Eq. Rep.* 460,) there is no doubt that the law most carefully protects the interests connected with marriage; and that it established the *union of interest* for the purpose of domestic *union*, and excluded the testimony of one, when the other was excluded on account of this *union*; and the expressions of authorities above cited, if confined to the exclusion of the one when the other is excluded, have a definite meaning, capable of practicable application; but if they are carried beyond this limit, and are supposed to introduce the tendency to domestic discord as a ground of exclusion, they will be found to be contrary to the known principles of evidence, and to be incapable of being consistently applied.

If this ground of exclusion existed, it would apply to other witnesses as well as to parties; their domestic peace being equally important. But it is clear with respect to witnesses not parties, that they cannot refuse to be examined on any grounds derived from marriage, and that husband and wife may mutually contradict and discredit each other, upon matters full of family dissension, as freely as if there had been no marriage. Even if it could be supposed that the law regarded only the domestic peace of families, and protected their confidence, still the supposed ground of exclusion is not consistently applied; for if a husband is assaulted or libeled,

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he may seek redress either by action or by indictment. In either form he is in substance a party. If he proceeds by action, at common law he and his wife are both incompetent; if by indictment, both are admissible, either to corroborate, contradict or discredit each other. Thus, in the case of an executor, where the action will enure to the sole profit or loss of the heirs at law, who would be, in substance, the parties, each heir may now be called as a witness for or against the executor, and compelled to testify; and the wife of each may be compelled to give evidence in the same case, although her testimony be to contradict, discredit, or even impeach that of her husband, and so of the husband against the wife. Now if the principle of excluding the wives of parties was the protection of domestic peace and confidence, the wife ought to be excluded equally in both cases; but as she was excluded only in the action, where the husband was also incompetent, it seems better reason to attribute her exclusion to the uniform principle of union, or *interest* arising from that union, than to suppose the courts would protect the domestic peace of parties, and not of witnesses, or that what was protected in the civil court would be neglected in the criminal. With respect to the protection of confidential communications between husband and wife, there is good reason for such protection at all times; but no such principle has been brought into practice. The decisions, excluding the husbands or wives of parties, are often accompanied with sacred declarations in favor of such protection; but as the exclusion extended to all the testimony, whether it was confidential or not, and as no protection was given to conjugal confidence in respect to *witnesses not parties*, who were as much within the reason of the rule, if it existed, as the other class, it may be safely affirmed that no such rule has as yet been established. As to the authorities, most of the decisions in favor of excluding the wives of parties were given in cases where the husband was excluded, and therefore no matter how strong may have been the expression of public policy, and in favor of preventing domestic discord, &c., all

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those decisions are consistent with the principle that *interest* was the ground of objection.

Of late years material changes have been made in the law of husband and wife, both in this country and England, but particularly in this state. The wife has been admitted to separate rights of property, and, as a consequence, to separate rights of action even as against the husband himself. The marriage contract has lost its ancient feature of indissolubility, and actions between parties for the breach of it are constantly before the courts. In the case of an action between these persons, whether in regard to some disputed property, or by the husband for a divorce, or by the wife for a separation, it is idle to assert that they stand before the court in that amicable attitude, in which, in civil suits, they invariably stood at common law.

Radical changes have also been effected within the last sixteen years in the law of evidence, and the competency and admissibility of witnesses. England took the initiatory step by the passage of *Lord Denman's act*, in 1843. Its general feature was that no person offered as a witness in a civil case should be excluded by reason of incapacity from crime or from interest; with a proviso that the same should not extend to the party to the record, and some others enumerated; nor the husband and wife of such persons respectively. *Lord Brougham's act* was passed in 1851. The first section repealed all the proviso of Lord Denman's act, except that relating to husband and wife. The second section made all parties to actions competent witnesses. The third section made husbands and wives of parties in criminal proceedings incompetent; and the fourth section rendered the statute inapplicable to actions founded upon adultery or a breach of promise of marriage.

The first case under this act was *Barbat v. Allen*, (7 *Exc. Rep.* 609,) in which the question was, whether the husband or the wife of a party to the record were competent witnesses, and it was held they were not. The case of *Stapleton v.*

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*Crofts*, (10 *Eng. Law and Eq. Rep.* 455,) in the queen's bench, followed, in which the same question was presented, with the same ruling. There are many expressions, however, in the latter case, indicating that both court and counsel regarded married persons, *when parties to the record*, as within the statute.

The case of *Alcock v. Alcock*, (12 *Eng. Law and Eq. Rep.* 354,) before Vice Chancellor Parker, was an action by the wife against the husband, concerning her separate estate, in which it was held that the parties were inadmissible as witnesses, and the reasoning was, that before the statute there would have been two objections to their competency, viz. one that they were parties; the other, that from reasons of public policy they were inadmissible against each other; that the first of these objections had been removed by the statute, but the latter was untouched by it. This *reasoning* is not sound. It *assumes* that the second objection exists in such a case, which is not so. At common law the wife had no separate estate, and hence no such relative position of the parties could concur in a civil suit at common law; and when they stand before the court in a different attitude, the reason of the common law rule of evidence fails.

The next case was *McNeillie v. Acton*, (21 *Eng. Law and Eq. Rep.* 3,) also in chancery, in which married persons, co-defendants, were held inadmissible for each other. In making this ruling, Vice Chancellor Stuart expressly stated that he followed *Alcock v. Alcock* (*supra*) simply as authority; his own opinion being the other way. In *Stakehill and wife v. Pettingill*, in the queen's bench, where husband and wife sued for an injury done to the wife, it was held by all the court that the wife was a competent witness to prove the plaintiff's case. This case is found in a note, 10 *Eng. Law and Eq. R.* 458, and was probably not reported in the regular series, in consequence of *Lord Campbell's act* in 1853, which covered the whole disputed ground, and made husband and wife witnesses for and against each other, except in criminal proceed-

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ings and cases of adultery ; but prohibiting the disclosure of confidential communications made to them during marriage. Lord Brougham's act was very similar to our present code ; and the decisions under it, it will be perceived, are very strongly in favor of the competency of husbands and wives, *who are parties*, as witnesses.

In Connecticut, a statute was passed in 1848 to the effect that no person should be disqualified as a witness, by reason of his interest as a party or otherwise. In 1849 a limitation was introduced in the case of criminal proceedings. Under these statutes it was held, in *Merriam v. Hartford and New Haven Rail Road Co.*, (20 *Conn. Rep.* 354,) that married persons were admissible for each other, and in *Lucas v. The State*, (23 *id.* 18,) it was in substance said by Church, Ch. J. that in all civil actions married persons were competent to testify for each other.

In Vermont, a statute precisely similar to the Connecticut statute of 1848 was passed in 1852 ; after which it was held in *Manchester v. Manchester*, (24 *Verm. Rep.* 649,) that in a petition of divorce the parties were not competent witnesses in their own behalf ; but Redfield, Ch. J. said, "If the statute provided in terms that all parties should be witnesses, no doubt the parties to this proceeding would be thereby rendered competent. But the statute is not so broad. It only provides that no one shall be disqualified as a witness by reason of being a party. These disqualifications, but no other, are removed by this act." This case, although it proceeds upon a narrower construction of the statute than the Connecticut cases, is enough. The doctrine is to the effect that, under a statute like that in this state, the parties would have been admissible.

In 1856 Massachusetts enacted that the parties in all civil actions might be admissible to testify in their own favor, and might be called as witnesses on the opposite side. Under this statute in *Barber v. Goddard*, not yet reported, but an abstract of which may be found in 10 *Law Rep.* 408, it was

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held "that the wife was not a competent witness for her husband in any case, *unless she were a party*;" and in *Snell v. The Inhabitants of Westport*, (*Id.* 144,) it was held that in an action by the husband and wife, for an injury to the wife, she was a competent witness for the plaintiff.

It will thus be seen that the authorities in courts, other than in our own state, wherever the present question or a similar one has been presented, are, with hardly an exception, in favor of admitting husband and wife as witnesses whenever they are parties.

But the construction now contended for is not new. More than one hundred and forty years ago some of the states of this country had statutes admitting parties as witnesses in actions arising on book account, (*see note a*, 9 *Conn. R.* 348;) and the construction of such statutes was that married persons, when parties, were competent as witnesses.

In Vermont, under a similar statute passed more than twenty-five years ago, it was held in *Carr v. Cornell*, (4 *Verm. Rep.* 116,) that the wife of a party was not a competent witness, unless a party to the record. But in *Andrews and wife v. Foote*, (17 *Verm. Rep.* 556,) and *Jay and wife v. Royce*, (18 *id.* 342,) the wife as a co-plaintiff was received as a witness in each case, and held competent.

It must be borne in mind that this reason does not touch the competency of the wife in an action between the husband and a third person. The code has not gone to that extent. In such cases married persons stand as they did at common law. Neither does the reason affect another rule in the law of evidence touching husband and wife, viz. that communications between them are privileged. That is not a rule concerning the competency of witnesses, but relates exclusively to the subject matter of their proposed evidence. It is analogous to the rule between attorney and client.

The first changes in this state were to remove the disqualification of interest, except in the case of parties and those immediately interested, and to allow a party to be called by

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an adverse party. (*Code*, 1848.) A glance at the decisions under that statute would not be inappropriate.

The first case which arose after the adoption of the code, was that of *Pillow and wife v. Bushnell*, (4 *How. Pr. R.* 9; 5 *Barb.* 156,) tried before Mr. Justice Cady in 1848. The action was for assault and battery upon the wife; and after the plaintiffs had rested their case, the defendant called the wife to prove his defense, and she was admitted. The defendant had a verdict, and on appeal by the plaintiff the general term held her admission to be an error. It was conceded that the letter of the statute would admit the wife, but it was held that such was not within the intention of the legislature. It is, however, worthy of note, that the learned justice who wrote the opinion, although using the phrase that "at common law husband and wife are excluded from giving evidence for or against each other;" yet, when he comes to define the rule, he recognizes the same distinction, herein insisted upon, as the true theory; that they cannot be witnesses *for* each other, because of the identity of *interest*, nor *against* each other, on a principle of public policy, &c. Therefore *Pillow v. Bushnell* is not a decision for this case. In that, the wife was called against the husband, and was rejected as incompetent, on the ground of public policy; while in this case, the wife was called for her husband, and also in her own behalf.

The next case was that of *Erwin v. Smaller*, (2 *Sand. Rep.* 340,) where the wife, *not a party*, was called as a witness against her husband, and was rejected as incompetent, on the grounds of public policy pertaining to the domestic relation.

The next case arose in 1850, and was that of *Hasbrouck v. Vandervoort and Hayward*, (4 *Sand.* 596; 5 *Selden*, 153.) The action was by Hasbrouck as trustee of the separate estate of Adeline Pickering, wife of Wm. L. Pickering; and on the trial the said Wm. L. was offered as a witness on behalf of the trustee, and was objected to as incompetent, and excluded. On appeal, the general term and the court of appeals affirmed the ruling. The superior court placed its decision

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on the ground of public policy, and that the rule had not then been changed by the code of procedure. The court of appeals, in its decision, after citing several cases, says : " It is entirely clear that the rule of exclusion of *husband* and *wife*, when the other is a *party*, or *interested* in the event, depends merely upon the existence of the relation, and not at all upon the existence in the party offered as a witness of an interest in the event, independent of that which the law may attribute to him by reason of the marriage relation." And speaking of the code, as applicable to the case, said : " The only objection to Mrs. Pickering's competency was interest in the event ; that the code has removed, and made her competent. But the statute has not removed her *interest*, and while that remains, *her husband* cannot be competent. Being incompetent at the common law as husband, and not upon the ground of interest in the event, he must remain incompetent, until some statute shall remove the ground of incompetency." Thus, in substance, holding that the exclusion of husbands or wives from being witnesses *for* each other, rested upon the union of interest arising from the marriage contract. This case does not, therefore, militate against any ground assumed in this opinion. First, because the law has been changed since its decision ; and second, because the cases were not alike in their facts. In the one case, the husband and wife were co-parties, and in the other, they were not ; in the one case both were offered in their own behalf, and in the other not.

*Arborgast v. Arborgast* (8 How. Pr. Rep. 299) was a case at special term, where the husband had sued for divorce on the ground of adultery. The wife did not appear, and an order of reference being taken, the wife was offered as a witness to prove the adultery. The court held that the testimony of a defendant would not warrant a judgment for a divorce. This was undoubtedly correct, and all that it was necessary to decide ; but the learned justice made mention of the common law rule excluding husband and wife, and cited approvingly *Pillow v. Bushnell*.

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The case of *McGinn v. Worden* (3 *E. D. Smith's Rep.* 355) was where the wife was sued with the husband, and was offered as a witness, after the plaintiff had been examined as a witness in his own behalf, and was excluded. This case arose under a branch of section 399 of the code, not now under consideration, and therefore does not touch the question presented by this case. But the court in that case expressed the doubt whether the legislature had not altered the law, in such case, so as to admit both husband and wife as witnesses, with the consent of the other.

These are all the cases decided since the enactment of the code, and previous to the last amendment, which have come to my notice; and it will be seen that none of them do or could present the precise question which arises in this case. In 1857 the legislature amended the 399th section of the code, so as to read as follows: "A party to an action may be examined in his own behalf, the same as any other witness." Since then there has been decided the case of *Macondry v. Wardle*, (26 *Barb.* 612,) which was an action against husband and wife to compel the application of certain property, standing in her name, to the payment of a judgment against the husband, upon the ground of fraud. On the trial the plaintiff called the wife as a witness, and on objection she was excluded. This ruling was sustained at general term, upon the ground that the wife could not have been a witness, if the action was solely against the husband, and that making her a party to the record did not remove the incompetency. That decision does not affect this case, because there the wife was called as a witness *against* the husband, which right depends not upon section 399, under which parties may offer themselves as witnesses in their own behalf, but upon sections 390, &c., and may, being *against*, be controlled by the question of public policy.

The next reported case is *Smith v. Smith*, (15 *How. Pr. Rep.* 165.) The facts of the case were precisely like those of *Arbogast v. Arbogast*, (*supra*,) and the order of the court the

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same. In deciding the case, the justice said : "The language of the statute clearly embraces her ; and yet one familiar with the rules of the common law relating to husband and wife, and the reason assigned, time out of mind, for those rules, would be likely to hesitate long before coming to the conclusion that the legislature *intended* an innovation so dangerous to the peace of families, and the harmony of the domestic relations." In other words, notwithstanding the legislature had said, in plain words, that husband and wife when parties were competent as witnesses, it did not intend what it had said, and therefore it was the duty of the courts to defeat its expressed will by judicial construction. I am compelled to dissent from any such conclusion. The learned justice in that case frankly says : "But for certain decisions, I should have held that the legislature had abrogated the rule prohibiting husband and wife from being witnesses when parties." The authorities which controlled his judgment are those herein before cited, and do not, as I insist, control the present statute. The argument of "danger to the peace of families," &c., is answered by my illustration that no such consideration governs the question, as to witnesses not parties.

I have been favored with the opinion of Justice Strong, of the 7th district, in the MS. case of *Gale v. Gale*. That was an action for a limited divorce, and the plaintiff on the trial offered herself as a witness in her own behalf, and against her husband. She was rejected as incompetent, and on appeal the general term sustained the decision, on the ground that the amendment to the code in 1857 only removed the disqualification of being a party, and consequently all other grounds of incompetency remained. This decision can be sustained if the question of public policy is retained as a ground of exclusion, when the wife is offered as a witness against the husband, without adopting the reasoning or construction of the court, which I shall endeavor hereafter to show is unsound.

I have also met with the newspaper report of *Hulseapple and wife v. The Eighth Avenue Rail Road Company*, tried

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at the New York circuit before Justice Hogeboom. The action was for negligence, whereby the wife was injured; on the trial she was sworn, and testified as a witness. It does not appear whether any objection was made to her examination, but as the defendants sought to contradict her evidence, the inference is that the objection was made, and she held admissible.

After a careful examination of the cases arising in this state, which have come under my observation, that have a bearing upon the question involved, I am of the opinion that the precise question presented by this case upon the law, as it now stands, is not *res judicata*, but open.

When rules once become fixed in the human mind, it is hard to eradicate them and substitute others in their place. The rule of the common law, of the inadmissibility of the husband and wife as witnesses, in actions where one is a party, or where both are parties, had so long existed—had become so thoroughly interwoven into our legal system—that it seems almost impossible for the legal profession to admit the possibility of change. After the passage of the law removing the disqualification of *interest*, the courts were reluctant to obey the statute, and the books are full of learned and able opinions, showing how “not to do it.”

In two cases cited, *Pillow v. Bushnell* and *Smith v. Smith*, the court conceded the letter of the statute, but held that it was not within the *intention* of the legislature. At the time of the decision of *Pillow v. Bushnell*, the only legislation on the subject was that of Lord Denman's act, in England, which, as we have seen, expressly excluded parties, and husbands and wives, and that in this state, admitting interested witnesses and the adverse party, but expressly excluding parties to the action, and those for whose immediate benefit the action was prosecuted or defended. It is not surprising, therefore, that in such a state of the question, the courts should hesitate. But the same reason, applied to the recent changes, leads now to the opposite conclusion. Intermediate the acts

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of 1848 and 1857, the statutes in England, Connecticut, Massachusetts and Vermont, herein named, and the cases herein cited, have occurred; and the general and comprehensive amendment to the code, now under consideration, was enacted with the light and spirit of those acts as guides, and must have been intended to include all persons, no matter what their relation to each other.

The amendment of 1857 does more than simply remove the objection of being a party. It affirmatively and positively makes *parties competent witnesses*, so far as any objections based upon their relation to the action are concerned. It says: "A party to an action or proceeding may be examined as a witness in his own behalf, the same as any other witness." The first clause is the same as the modern English and Massachusetts statute, and the old statutes of Connecticut and Vermont, relating to book debt. It puts the parties, as witnesses, upon the same footing as other witnesses in the suit, and intending clearly that all other objections which could not be taken in that suit against *other witnesses* are removed. To illustrate: A general objection is bad character, conviction of crimes, &c. These, in all suits, incapacitated persons as witnesses. The witness' relation to the suit, or to the parties, had nothing to do with the objection. Such objections still affect parties. But the objection that the person offered as a witness was interested, or was a party, or the husband or the wife of a party, were special objections, or peculiar to the suit in which the objection was raised. Now a statute admitting parties, and making them obnoxious only to such objections as might be made to witnesses generally in the action, necessarily abrogates an objection which cannot be taken to any other witness in the action, and which is not general in its nature, but depends entirely upon the relation of a party offered as a witness, to the action, or to the other parties to it.

The second clause of the enactment, "the same as any other witness," should be allowed to have some force, and should

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be applied precisely as it reads: "A party, &c. may, &c., the same as any other witness," that is, subject to the same restrictions, or objections, that might or could be taken to any other witness. The statute is not that a party may be examined, &c., the same as if he were a witness in the action. The statute not only makes parties witnesses, but puts them upon the same footing as other witnesses, subject to the same objections as other witnesses, and none other.

But in this case the defendants were offered as witnesses in their own behalf, as well as for each other. If the reason of the common law rule for excluding husband or wife from being a witness for the other was based solely upon the union of interest created by the marital relation, that disqualification having been removed, as well as that of parties to the record, the defendants in this case were admissible as witnesses *for* each other. But whether the common law rule rested alone upon the ground of interest or not, being parties to the record, and necessarily so, they are most certainly competent as witnesses in their own behalf. Such is the letter and spirit of the enactment. "A party to an action, or proceeding, may be examined as a witness in his own behalf, the same as any other witness." Here no limitation, qualification, or restriction, is imposed by the law-making power. What right, then, has the court to fritter away by judicial construction the plain letter of the statute, to make an exceptional case, where one party shall be deprived of the benefit of his own testimony, while his opponent is permitted to testify? Clearly none.

I have before said that this question should be discussed as a general question of evidence, and decided on principle—upon a rule that will work in all cases alike. If the legislature, when it made parties witnesses, had intended any exception to the general rule, it would have said so in the act; not having said so, the legal inference is that none was intended.

I am therefore of the opinion that under the code, as it now reads, husband and wife are competent witnesses in their own behalf, when co-plaintiffs or co-defendants; and in like cases

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also competent witnesses for each other; that in actions between one of them and a third person, the one is not a competent witness for or against the other; and that the law is untouched by the code as to confidential communications or matters between them.

There should be a new trial, costs to abide the event.

POTTER, J., concurred.

ROSEKRANS, J., dissented.

New trial granted.

[SCHENECTADY GENERAL TERM, January 3, 1860. *James, Rosekrans and Potter, Justices.*]

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WILLIAMS and others vs. CONRAD and others.

A testator, by his will, directed that all his real and personal estate should remain as it was at the time of his death, for the exclusive use of his wife and children who were under age and unmarried, and should be so managed by his executors as would accomplish two objects; first, the comfortable maintenance of his wife; and second, the comfortable maintenance of his children; that nothing consisting of the character of personal estate should be sold, unless under the greatest necessity, and then under the immediate direction of the executors; that the property, both real and personal, should be so kept, and the income so used, as might best subserve the objects above stated, as long as the testator's wife lived; and after her death the whole of his estate should be so occupied for the benefit of his children who were under age and unmarried, as might best promote the objects above mentioned; that after the children were of full age, and after the death of the wife, all the property should be sold, and the proceeds divided among the children, as the law directs. That if the widow should marry again she should have no right or claim to the estate, and should cease to be executrix, and be "cut off" from every portion of his estate. A legacy of \$500 was given S. Conrad, to be paid to him after the death of the testator's wife, and after the testator's children should be of full age, "out of the moneys so realized out of the sale of my estate." There was no direct devise to the executors, nor any express trust, in words, created, in them.

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- Held*, 1. That after the payment of his debts, &c. the testator intended that all his property, real and personal, should remain and be kept undisposed of for the use of his wife and his children under age and unmarried, during the life of his wife, or until she should marry again.
2. That the testator also intended that all his property should be kept, and remain undisposed of, after the marriage or death of his widow, for the use of such of his children as should then be under age and unmarried.
3. That the testator intended his wife should use and receive, and apply, the rents and income of all the property to the support and maintenance of herself and children under age and unmarried, during her life, or until she married again; which was substantially a devise and bequest of all his property, real and personal, to her for such term, for that use and purpose.
4. That so far as such devise and bequest to the wife were for the benefit of the children under age and unmarried, they involved an express trust, which made her term inalienable during the minority of the unmarried children, or of an unmarried child; but that as such inalienability could not continue longer than her life, such devise, and bequest, and trust, was lawful and valid.
5. That the further trust after the death or marriage of the widow was not valid, as it might have suspended the absolute power of alienation, for a longer period than during the continuance of two lives. But that the invalidity of that trust did not affect the validity of the devise and bequest to the widow; and there was, therefore, by the will, a good and valid devise and bequest to the widow, for life.
6. That all the property, or the proceeds of its sale, should be divided or distributed, and the rights of all the parties declared, upon the theory that the will made no disposition of the property after the death of the widow, and that the same should be treated, and be divided and distributed among the heirs and next of kin of the testator, or those who had succeeded to their interest by purchase or otherwise, as an undisposed of reversion.
7. That the real estate of which the testator died seised vested, on his death, in all his surviving children, as his only heirs at law, subject to the devise thereof to his wife for the use of herself and of the children under age and unmarried, and subject to the implied power given to the surviving executor to sell, &c.; and that the rights and interests of all the parties claiming, by descent, purchase or otherwise, must be declared, and the proceeds of the sale, after the payment of the \$500 legacy, must be distributed, upon the theory that it was so vested.
8. That the legacy of \$500 to S. Conrad was vested, not contingent; that it did not lapse by the death of the legatee before the death of the widow; and that it must be paid out of the proceeds of the property, to the personal representatives of S. Conrad, &c., and the remainder of the proceeds must be distributed among the heirs and next of kin of the testator, and those claiming and entitled under and through them.
9. That there was no ground upon which the real estate could be considered as converted into money, from the death of the testator.

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The fact that a person appointed executor and trustee, by will, has not qualified as executor, will not disqualify him for the execution of the power of sale, given to him as trustee; *it seems*.

And so long as the trustee is willing to execute the power, the court will not, in a suit to which he is not a party, appoint another person to execute the power of sale.

**A**CTION for the construction of a will. Ephraim Conrad died the 5th day of November, 1834, in the city of New York, leaving a last will and testament duly executed, his widow Mary Conrad, and eleven children; one, Mary Elizabeth, born after his decease. Of these children, all were minors at the time of his death, but three. He died seised and possessed of both real and personal property. Mary Conrad, the widow, died in 1857. Seven of the children died before the widow, five of them leaving issue, and two without issue. The four children of the testator surviving the widow, were of the age of 21 years and upwards, at the time of her death.

*Charles Cheeney*, for the plaintiffs.

*W. L. Livingston*, for the defendant Mrs. Deming.

*G. C. & E. J. Genet*, for the heirs of Mrs. Hasler.

*Andrews, Colby & Thompson*, for Anna F. Conrad and others.

**SUTHERLAND, J.** The plaintiffs, two of the surviving children of Ephraim Conrad, the testator, by the complaint in this action, ask for a judicial construction of his will, and to have the rights and interests of the parties claiming the property or proceeds of the property of which he died seised and possessed, under his will or otherwise, adjudged and determined. The testator can hardly be said to have made any disposition of his property by his will, in direct and apt words. It is plain, however, that after the payment of his debts and funeral expenses, he intended that all his property, real and personal, should remain and be kept undisposed of for the use

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of his wife and his children, under age and unmarried, during the life of his wife, or until she should marry again. The second article of the will is, "that all my real and personal estate shall remain as it is at the time of my death, for the exclusive use of my wife and children, who are under age and unmarried; and shall be so managed by my executors, hereafter named, as will accomplish two objects; first, the comfortable maintenance of my wife; and second, the comfortable maintenance of my children—great care being taken that my children's education be carefully attended to, so that they receive a good English education—of course this applies only to my young children under age and unmarried." By the 3d article the testator says, it is his will "that nothing consisting of the character of personal estate shall be sold, unless under the greatest necessity, and then under the immediate direction of my executors." It is plain, too, I think, that the testator intended that all his property should be kept, and remain undisposed of after the marriage or death of his widow, for the use of such of his children as should then be under age and unmarried. By the 4th article of the will he says, "It is my will that my property, both real and personal, shall be so kept, and the income so used, as may best subserve the objects above stated, as long as my wife lives; and after her death, the whole of my estate shall be so occupied for the benefit of my children, who are under age and unmarried, as may best promote the objects above mentioned." The 5th article is, "After my children are of full age, and after the death of my wife, it is my will and desire, that all my property shall be sold, and the proceeds divided among my children, as the law directs." By the 6th article he says, if his wife should marry again, it is his will that she shall have no right or claim whatsoever to his estate, and that she shall cease to be his executrix; and that the surrogate of the city and county of New York should appoint an executor in her place; and in such case, he "cuts her off" from any and every portion and benefit of his estate. By the 7th article, he gives a legacy of \$500 to

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Samuel Conrad, of Philadelphia, to be paid to him after the death of his wife, and after his children shall be of full age, "out of the moneys so realized out of the sale of my estate." By the 8th and last article, he appoints his wife executrix, and Charles O'Connor, Esq. executor. There being no direct devise to the executors, and no express trust, in words, created in them, it is probable the testator intended that his wife should use and receive, and apply, the rents and income of all the property to the support and maintenance of herself and children, under age and unmarried, during her life, or until she married again. This was substantially a devise and bequest of all his property, real and personal, to her for such term, for such use and purpose; for a devise of all the rents and profits of land for a certain term is equivalent to a devise of the land itself for such term.

So far as such devise and bequest to his wife were for the benefit of the children under age and unmarried, they involved an express trust, which made her term inalienable during the minority of the unmarried children, or of an unmarried child; but as such inalienability could not continue longer than her life, such devise, and bequest, and trust, was lawful and valid. (*Stewart v. McMartin*, 5 Barb. 438. *Haxtun v. Corse*, 2 Barb. Ch. Rep. 506.)

The intention of the testator as to the disposition and use of his property during the life of his wife, could be lawfully carried out, and it is presumed has been, for she never married again, and she used and occupied the property, and received the rents and income thereof, until her death.

As the widow never married again, and as all the children who survived her were of age when she died, it is quite immaterial whether the further trust after her death or marriage, probably intended for the benefit of the children who should be under age and unmarried at the time of the death or marriage, was or was not valid. But as that question was a good deal discussed on the argument of this case, I will say, that I think it plain that it was not valid; for as all of the children

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but three were minors, at the death of the testator, if valid, it might have suspended the absolute power of alienation for a longer period than during the continuance of two lives. If the widow had died, leaving two or more of the children surviving her, minors, they might severally have died before arriving at the age of twenty-one; or one or more of them might have died before the youngest arrived at the age of twenty-one, and thus, if the trust, probably intended for the benefit of minor and unmarried children, after the death of the widow, was valid, it might have suspended the absolute power of alienation beyond two lives. The widow and one or more of the children might have died, and yet the property, to fulfill the trust and the intention of the testator, might have been kept after their deaths undisposed of, until one or more of the children arrived at the age of twenty-one. (*Hawley v. James*, 16 Wend. 174. *Jennings v. Jennings*, 5 Sandf., aff. by the Court of Appeals.) But the invalidity of this trust, probably intended for the benefit of minor and unmarried children, after the death or marriage of the widow, did not affect the validity of the devise and bequest to the widow; and there was, therefore, by the will, a good and valid devise and bequest to the widow for life.

The only important practical question in this case is, who were entitled to the property, or the proceeds of the property, on the death of the widow? the four surviving children of the testator surviving their mother, under or by the will; or the heirs at law, and next of kin of the testator, on the theory that the only valid disposition made of the property by his will, except the \$500 legacy to Samuel Conrad, was the devise and bequest of the same to his wife for life?

The plaintiffs insist that the four children who survived the widow are entitled to have all the property, or the proceeds of a sale of the property, divided equally between them, under and by force of the provisions of the will. Several of the defendants, grandchildren of the testator, whose parents died before the widow, insist that all the property, or the proceeds

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of its sale, should be divided or distributed, and the rights of all the parties declared, upon the theory that the will makes no disposition of the property after the death of the widow, and that the same should be treated, and be divided and distributed among the heirs and next of kin of the testator, or those who may have succeeded to their interest by purchase or otherwise, as an undisposed of reversion. I think the latter is the correct view of the will, and of the rights of the parties, on the conceded facts of this case. There is in words no devise to the executors, as such, or as trustees. There is no duty or trust enjoined on the surviving executor, after the death of the widow, which makes it necessary to imply a devise to him. There is, in fact, no devise, disposition or limitation of the property or estate after the death of his wife, and after his children are of full age, except the \$500 legacy. By the 5th article of the will, he says, it is his will and desire, after his children are of full age, and after the death of his wife, that all his property be sold, and the proceeds thereof equally divided among his children, share and share alike, in such manner as the law directs.

There is no express power given to Mr. O'Connor, the surviving executor, to sell and divide the proceeds; but the testator no doubt intended he should do so, and there is, therefore, an implied power given to him by the will to sell, &c.; but it is a mere power in trust, requiring no devise to him, or estate, or interest in him, for its execution.

The expression of the testator's will and devise, that the proceeds of the sale should be equally divided among his children, &c. as the law directs, is equivalent to a declaration that he did not desire or intend by his will to make any disposition or limitation of the proceeds in favor of any particular children or heirs, but that he did intend and desire such proceeds to be disposed of and distributed under the direction of the law. He does not say that he desires the proceeds to be divided among his children living at the time the property shall be sold, share and share alike; but among all his chil-

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dren then (at the time he made his will) living, without thinking that some of them might die, leaving issue, before the property was sold. He desired the proceeds to be equally divided among his children, in such manner as the law directs. But the law does not direct the proceeds to be divided among the four children surviving the widow, but among the descendants of the testator, including grandchildren, &c. If the four children surviving the widow are exclusively entitled to the proceeds of the sale beyond the \$500 legacy, they are so entitled by the direction of the testator, and not of the law.

It is plain to me, that the real estate of which the testator died seised, vested on his death in all his surviving children, including the child born soon after his death, as his only heirs at law, subject to his devise thereof to his wife, for the use of herself and of the children under age and unmarried, and subject to the implied power given to the surviving executor to sell, &c.; and the rights and interests of all the parties claiming by descent, purchase or otherwise, must be declared, and the proceeds of the sale, after the payment of the \$500 legacy, must be distributed upon the theory that it is so vested.

The legacy of \$500 to Samuel Conrad is vested—not contingent. The payment of it was postponed until the sale of the property; but it is payable, absolutely and certainly. It did not lapse by the death of the legatee before the death of the widow. The legacy must be paid out of the proceeds of the property to the personal representatives of Samuel Conrad, or to the person or persons having a right to it, from or under him, and the remainder of the proceeds must be distributed among the heirs and next of kin of the testator, and those claiming and entitled, under and through them.

There is no ground upon which the real estate can be considered as converted into money from the death of the testator. Such conversion is not called for by the will, and would be inconsistent with the plain intention of the testator. He

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did not desire or intend his property to be sold until after the death of his widow, and after his children were all of full age.

Thus much as to the construction of the will, and the rights of the parties in and to the property and its proceeds.

The complaint asks that the property be sold by some suitable person to be appointed by the court, &c. As the case now stands, I do not think the court can appoint a person to execute the power of sale. From aught that appears, Mr. O'Connor is willing to execute it. The fact of his not having been qualified as executor, would not probably disqualify him for the execution of the power. He would probably have a right to execute the power, though he never qualified as executor. (*Judson v. Gibbons*, 5 Wend. 224.) There is no allegation in the complaint that he has refused to execute the power; and if there was, he is not a party. The plaintiffs can apply to Mr. O'Connor to execute the power; and if he refuses, or executes a disclaimer, they can amend their complaint by alleging such refusal or disclaimer, and by making him a party defendant. If he declines executing the power, he can forthwith put in an answer declining or disclaiming its execution, and the court can then appoint some suitable person to sell the property and distribute the proceeds, with power to act as receiver in the mean time. (See *King v. Donnelly*, 5 Paige, 47; *Id.* 559; 3 R. S. § 122, 5th ed.; *Id.* 22, § 90.)

All other questions are reserved until the settlement of the decree declaring the construction of the will and the rights of the parties according to the principles above stated; which decree is to be settled on three days' notice.

[NEW YORK SPECIAL TERM, December 10, 1859, Sutherland, Justice.]

DUNCAN and others, Trustees, *vs.* STANTON & RUGER.

An insurance company, located in Philadelphia, entered into an agreement with the plaintiffs, whereby, for the purpose of extending and more firmly establishing the business of insurance in the city of New York, it agreed to provide and set apart in the hands of the plaintiffs, as trustees, a fund to be formed by the premium notes and cash premiums received by said company, for insurances to be effected by them in New York, to the amount of \$100,000; which fund was to be held by the plaintiffs for the payment of all losses under such insurances, and for no other purpose. Subsequently the company, through the plaintiffs as their agents, effected numerous insurances, in New York. Among others, the defendants gave a note to the company, for premiums on policies issued by the company; which note was duly indorsed to the plaintiffs for the purposes of the trust. In an action by the plaintiffs, as trustees, upon the note; *Held* that until all insurances effected by the plaintiffs as agents of the company were discharged, the company could not reclaim from the plaintiffs any of the securities assigned to them; and that no creditor of the company had any right until that time, to have his claim against the company paid from such notes, or their proceeds.

Accordingly *held*, that in such action upon the note, the defendants could not set up as a counter-claim, a claim held by them against the insurance company, for a loss under a policy.

THIS case came before the court on an appeal from a judgment rendered by Justice CLERKE, in May, 1858. The action was brought to recover the amount of a note for \$66.25, made by the defendants on the 19th of March, 1856, payable to the Farmers and Mechanics' Insurance Company, three months after date, and indorsed to the plaintiffs before the same became due. On the trial, the defendants claimed a right to set-off against said note, damages due from the Farmers and Mechanics' Insurance Company of Philadelphia, for losses under a policy of insurance effected with them by the defendants. This set-off was allowed, and exception taken by the plaintiffs. The admission of this evidence presents the single point in this case. The note was passed to the plaintiffs under the following circumstances: In December, 1855, the Farmers and Mechanics' Insurance Company of Philadelphia entered into an agreement with the plaintiffs, whereby, for the purpose of extending and more firmly establishing the business of insurance in the city of

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New York, the company agreed to provide and set apart in the hands of the plaintiffs, as trustees, a fund to be formed by the premium notes and cash premiums received by said company, for insurances to be effected by them in New York, to the amount of \$100,000; which fund was to be held by the plaintiffs for the payment of all losses under such insurances. This fund was to be held for no other purpose whatever, and could not be withdrawn from the plaintiffs by said company, so long as said trust should continue in force, except for the payment of losses applicable under the trust. And by said trust agreement, the plaintiffs were to have the right to retain out of any money or premium notes which might come into their hands, all costs, charges, expenses, disbursements, and fees, which they might be called upon, or be liable for, or be obliged to pay, for or by reason of the execution of this agreement, or the trust thereby created, and also a commission of one per centum upon the gross amount of money and premium notes that might be received by them respectively, under and by virtue of said trust. Subsequent to said agreement, the company proceeded to effect numerous insurances in New York; and in the course of such business, the defendants, for premiums of insurance effected by said company, gave the note on which this action is brought, and said note was thereupon duly indorsed to the plaintiffs by the company for the purposes of said trust, and the said note was one of several in like manner transferred to the plaintiffs under said agreement. A number of policies had been issued by said company at their New York agency, which were (at the trial) still outstanding and unsettled.

The note in suit, with interest, amounted to \$79.99. The judge found, among other facts, that under insurances effected by said company, for the defendants, and for which the said note was given as the premium, the defendants met with losses amounting to \$80.

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*Van Buren & Burnham*, for the appellants.

*Gilbert Dean*, for the defendants.

*By the Court*, INGRAHAM, J. 1. The title to a promissory note may be made by mere delivery, without any written assignment; and the delivery of the note in suit to the plaintiffs, by the authority of the Farmers and Mechanics' Insurance Company, vested in the plaintiffs the legal title to the note.

2. The object of the transfer was to place under the control of the plaintiffs, as trustees, a fund to be held by them in trust for the payment of all losses on insurances to be effected with the plaintiffs, as agents for the company. The object was to secure all subsequent insurances made by the plaintiffs, and the pleadings admit that as such agents the plaintiffs effected numerous insurances.

3. The plaintiffs thereupon became trustees for all persons holding policies so effected, and were bound to respond to any person insured who should sustain loss. For this purpose, they were bound to hold the assigned property as well against the company as against all other parties.

4. It follows from these propositions, that until all insurances so effected were discharged, the company could not reclaim from the plaintiffs any of the securities assigned to them; and if the company could not reclaim them, no creditor of the company had any right to have his claim against the company paid from such notes or their proceeds.

The creditor could have no claim, until the company was in a condition, by the fulfillment of the trust, to demand from the plaintiffs a redelivery of the securities placed in their possession; and until the trust was so fulfilled, the defendants having a claim against the company, even in judgment, could not obtain satisfaction out of this property. If these propositions are correct, then the defendants could not set up, as a counter-claim to the notes, a claim held by them against the company.

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The note was transferred before maturity, and before the defendants had any claim against the company for a loss. The parties insured had, for a good consideration, obtained an interest in that note by way of security, which could not be divested by any subsequent act of the company, except cancellation of all insurances effected by the agents of the company; and the counter-claim offered by the defendants was no defense thereto.

But, independent of these views, the defendants set up no matter constituting a counter-claim in this action. If the plaintiffs had a right to bring this action upon the note, the only counter-claim the defendants could set up was one against the plaintiffs. The code contemplates no other counter-claim; because it provides that in all cases the action shall be brought, in the name of the party in interest, except in the case of an express trust, and in that case no provision is made for any counter-claim.

A defendant, having a demand against an assignor of a claim due at the time of assignment, may show such demand, on the trial, in order to prevent a recovery by the plaintiff against him, but none for an independent recovery against him. Denio, J., says, in *Vassear v. Livingston*, (3 Kernan, 248,) a counter-claim must contain the substance necessary to sustain an action on behalf of the defendant against the plaintiff, if the plaintiff had not sued the defendant.

All the benefit the defendant in such a case is entitled to, is under the 112th section, and that is limited to a defense existing at the time of the transfer. If none existed then, there is nothing shown on the trial to warrant the allowance of it afterwards.

The counter-claim was improperly allowed. The judgment must be reversed, and a new trial ordered; costs to abide the event.

[NEW YORK GENERAL TERM, December 13, 1859. *Roosevelt, Clerke and Ingraham*, Justices.]

**THE PEOPLE vs. THE RECTOR &C. OF TRINITY CHURCH, WM.  
H. PAINE and others.**

Where, in an action by the people, to recover the possession of real estate, the answer denied the allegations of the complaint, and averred that no title accrued to the people within forty years, and that the defendants acquired title in 1786, and had been in possession ever since; *Held* that, to warrant a recovery, the plaintiffs must show either a title in themselves, or a vacant possession.

Under such circumstances, the plaintiffs cannot maintain their action on the ground that the people are the presumptive owners of all lands in the state, until title in another is shown, and that in ejectment it is not necessary for the people to prove title, in the first instance.

Where proof is furnished, of a tenant being in possession, the presumption is a fair one, that such possession is legal; and until the plaintiffs show some right to the possession within forty years, they do not furnish sufficient evidence to dispossess the defendant of the property claimed.

**EJECTMENT** for a lot of land on Murray street in the city of New York, commenced the 17th December, 1856. The complaint was in the usual form. The answer was in three parts: (1.) A general denial of the complaint. (2.) An allegation that no title accrued to the plaintiffs within forty years before this action was brought, and that within that period the plaintiffs had not received rents or profits. (3.) An allegation that the corporation of Trinity church was seised of the premises in 1786, and has held them ever since, and that the other defendants are in possession under that corporation. The issue was tried at the circuit, in February, 1859, before Mr. Justice SUTHERLAND and a jury, and the exceptions there taken by the plaintiffs were ordered by the circuit court to be heard in the first instance at the general term. On the trial the plaintiffs proved that next before and at the time of the commencement of this action, the premises were occupied by the defendants Huggins, Fling, Herring and Black, as subtenants of the defendant Paine, and that Paine paid rent for the premises to the corporation of Trinity church; and that the premises are a part of a tract now called the church farm, and which was formerly known as the company's farm, the

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king's farm, the queen's farm, and the duke's farm. The plaintiffs also proved the following matters, viz : On the 19th August, 1697, Fletcher, then colonial governor, executed, in the name of the king, a lease of the farm above mentioned, to the rector and inhabitants of the city of New York in communion with the Protestant Church of England as by law established, for a term of seven years from the 1st August, 1698, at a yearly rent of sixty bushels of wheat reserved to the king. On the 16th March, 1697, the Earl of Bellamont was appointed governor, and succeeded to Gov. Fletcher. On the 12th May, 1699, a colonial statute was passed declaring said lease for a term of seven years an extravagant grant, and breaking and annulling the lease, and prohibiting all future grants of the farm, by any governor, for a longer term "than his own time of government," and declaring that such future grants should be *ipso facto* null and void ; which statute was duly confirmed by the queen in council on the 26th June, 1708. Governor Bellamont died the 5th March, 1701, and Viscount Cornbury was appointed governor the 13th June, 1701. On the 9th May, 1702, Gov. Cornbury, in the name of the crown, executed a lease of the farm to the rector and inhabitants of the city in communion with the established church, dated on that day, to hold during the term and time that he should continue in office as governor, at the yearly rent of 60 bushels of wheat reserved to the crown. On the 24th January, 1704, the rector and inhabitants in communion, &c. leased the farm to one Ryers, for a term of seven years, at an annual rent of £30. In the year 1705, Gov. Cornbury made some other grant of the farm to the rector, &c., but it was wholly without authority. Lord Cornbury continued to be governor in 1708, and was succeeded by Lord Lovelace on the 18th of December, 1708 ; and Gov. Lovelace was succeeded by Gov. Hunter, the 9th September, 1709. Before Gov. Hunter came out to the colony, the rector of the church, on the 2d December, 1709, wrote to Col. Riggs at London, for his aid to secure favor with the new governor before his entering the colony, so that the

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church might not be deprived of the farm, and that it might be secured to the church. On arriving at New York, Gov. Hunter, on the request of the church, consented to the church having the use of the farm for his time. The rector was not content with this, and wished the governor to join the church in a petition to the queen for a grant of the farm; but the governor declined the request, and would do nothing by which his own successor might be affected. Gov. Hunter continued in office till after the 7th July, 1719. On the 23d July, 1713, an information was filed in the colonial court of chancery, on behalf of the crown, against the rector and inhabitants of the city in communion with the established church, complaining that quit-rents and other services due to the crown were in arrears in many cases, and that the rector, &c. were tenants in possession of certain tracts of land in the city, for which an arrearage of quit-rents and other services was due, and praying for a discovery of lands so held, of the title by which the same were held, of the rents and services reserved, and of the arrears, and for an account of payments and receipts, &c., in order that the court might decree such relief as should be just. On the 21st January, 1714, the rector &c. sent a petition to the queen, stating that Gov. Cornbury (now become, by the death of his father, Earl of Clarendon) gave the church a lease of the farm for seven years, and in the 4th year of Anne (A. D. 1705 or 1706) gave the church a grant in fee, at a nominal rent of three shillings, deeming the actual rent of the farm his own perquisite as governor; but that the corporation of the church is now prosecuted in the court of chancery of the province, in the queen's name, for the rents reserved in the previous leases, and that the grant in fee is thus rendered disputable; and praying that the chancery suit may be stopped, and the grant in fee confirmed. In the year 1730, by the Montgomerie charter, the farm is included in the unpatented and unappropriated lands of the crown. In 1733 an act was passed by the provincial legislature, which was confirmed by the king in 1734, by which the statute of the 12th May, 1699, in relation

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to grants of lands by the governors of the province, above mentioned, was referred to and treated as in full force. The first constitution of this state, adopted in 1777, declared that the free exercise of religious profession or worship should be without discrimination or preference. By the act of 1779 Charles Inglia, rector of Trinity church, was attainted of treason, and his estates forfeited, and he was banished from the state. By the same statute it was declared, that the absolute property in all lands, rents, services, &c. belonging to the crown on the 9th July, 1776, did on that day vest in the people of this state. In the year 1779 the legislature passed an act for the temporary government of the southern parts of this state; constituting, for that purpose, a body called the council of safety, with power to make ordinances for sundry purposes in the southern district, and in 1783 another act was passed supplementary thereto. The council of safety, thus constituted, on the 12th January, 1784, finding that the dissensions in relation to Trinity church might materially endanger the peace of the city, made an ordinance which displaced all the wardens and vestrymen of that church, and vested the estates of the church, both real and personal, in certain citizens, nine in number, "to be retained and kept by them, or any five of them, until such time as further legal provision shall be made in the promises." The legislature, on the 17th April, 1784, adopted and confirmed the ordinance of the council of safety, appointed a new vestry for Trinity church, and repealed all the colonial statutes incorporating or endowing Trinity church. In 1785 the house of assembly of this state instituted a committee to inquire into the title of the farm; and a report of the committee was presented by Mr. P. W. Yates. That report gives a history of the leases, grants, statutes, &c., concerning the farm; and states the conclusion of the committee to be that the right and title to the farm were vested in the crown before the American revolution, and are now vested in the people of this state. The assembly concurred with the committee in the report. By the second constitution of this

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state, which went into operation the 1st January, 1823, the proceeds of all lands belonging to the state, thereafter to be sold or disposed of, are inviolably appropriated to the common school fund. By the revised statutes, the proceeds of all lands of the state not reserved or appropriated to public use are to be kept as a part of the school fund, and the care and disposition of such lands are vested in the commissioners of the land office, who are fully authorized to direct the disposition thereof.

No evidence was given by the defendants. The defendants moved the court to nonsuit the plaintiff and dismiss the complaint. The court granted the motion and dismissed the complaint, on the ground that the plaintiffs had failed to establish any title against the defendants, and that the action was barred by the statute of limitations. The plaintiffs excepted, and moved for a new trial, upon the exceptions.

*Charles Tracy*, for the plaintiffs. The only questions before the general term, are the two questions arising on the ruling of the circuit court, viz :

*First.* Did the plaintiffs fail to establish a title against the defendants ?

*Second.* Was the action barred by the statute of limitations ?

I. The title of the plaintiffs, against the defendants, was established at the trial. (1.) The people of the state of New York are the ultimate proprietors of all lands in this state. (*Const. of 1846, art. 1, § 11. 1 R. S. 718, § 1.*) (2.) The people, therefore, are the presumptive owners of any particular piece of land under consideration ; and no further evidence of title in the people is necessary in the first instance to make out a case in ejectment. (*People v. Van Rensselaer, 5 Seld. 291, 297, 319. People v. Arnold, 4 Comst. 508. People v. Livingston, 8 Barb. 253. Wendell v. The People, 8 Wend. 183, 188.*) (3.) The evidence given on the trial showed affirmatively a perfect and ancient title in the people. The lot

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in question is a part of the tract known first under the Dutch government as the company's farm, and afterwards known as the duke's farm, the king's farm, or the queen's farm, and more recently as the church farm. The entire farm belonged to the crown. The colonial governors had limited authority to give leases of it. In 1697 Governor Fletcher assumed to lease the farm to the church for a term of seven years; and this was deemed so much beyond his authority, that his lease was annulled as an "extravagant grant," by an act of the legislature in 1699, which also forbade any future lease by a governor for a longer term than his own time in office as governor. In 1702 Governor Cornbury executed to the church a lease of the farm for his own term of office, reserving a yearly rent of sixty bushels of wheat. This lease was made in the name of the sovereign, to whom also the rent was reserved. The church entered under that lease, as appears by the demise to Ryers in 1704, and the receipt of rents by the rector. In 1713 the crown asserted its title to the farm, by an information in the nature of a landlord's bill for discovery and relief, filed against the church. In 1730, by the Montgomery charter, the crown again asserted its title to the farm. The title having passed from the crown of England to the people of this state at the revolution, the state government early examined into it, and the right of the state was ascertained and asserted in the house of assembly. (3.) In addition to the direct line of title to the people by succession to the sovereignty, a title in the people as against Trinity church is made out on other grounds. After the rector of Trinity church had been attained for treason, and his estates forfeited and himself banished, the council of safety removed all the church wardens and divested the corporation of all its lands, and vested the lands in certain citizens, to hold until further provision should be made by law. The lands were never granted back to the church. Nor could they be lawfully given to the church, because it would have been an endowment of a church, in violation of the constitution of 1777, then in force. (*Lie-*

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*ber's Civil Liberty and Civil Government*, 99.) The seizure of church lands for the use of the new government in Virginia, by an act of the legislature passed the 12th January, 1802, was sustained by the courts of that state. (2 *Virg. Stat. at Large*, 314. *Turpin v. Lockett*, 6 *Call's Rep.* 113.) The act of 1784 did not restore the lands to the church. On the contrary, while naming a new vestry for the church, it confirmed the ordinance of the council of safety, by which the estates were taken away, and repealed every colonial statute by which the church had been incorporated or endowed. (4.) No legal provision having been made for these unappropriated lands, the constitution of 1823, followed by the revised statutes several years afterwards, devoted their proceeds to the common school fund; for the benefit of which this action is brought. (5.) The fact that the defendants were all in possession, directly or indirectly, at the time of the commencement of the action, was well proved; and no question was made by the court of the case being well made out in that respect. The requirements of the practice as to that matter were fully complied with. (*People v. Van Rensselaer*, 5 *Seld.* 291, 319. *People v. Denison*, 17 *Wend.* 312. *People v. Arnold*, 4 *Comst.* 508.)

II. The action is not barred by the statute of limitations.

(1.) There was no proof of occupancy by any of the defendants covering the period stated in the second defense, nor for half so long a time before the commencement of the action. (2.) There was no proof of the lot being inclosed or built upon for the period specified in the second defense, nor for half that period. (3.) The rector, &c. of the church originally entered the farm as tenants; and no holding over for any length of time can make their possession adverse to their landlord's title. (*Jackson v. Whitford*, 2 *Caines*, 215. *Jackson v. McLeod*, 12 *John.* 182. *Hodson v. Sharp*, 10 *East*, 360. *Balls v. Westwood*, 2 *Campb.* 11. *Ogle v. Birney*, 2 *Binney*, 468, 472. *Buller's N. P.* 103, 104. *Doe v. Moore*, 2 *Queen's Bench*, 555, 558.) (4.) The waiver of rent by the

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people, or their mere omission to demand it, is a sufficient compliance with the terms of the statute to take a case out of its operation. (2 R. S. 292, § 1, *sub.* 2; *Id.* 5th ed. p. 502. Act of 1801, 1 R. L. 184, § 91. Act of 1788, 2 Greenl. 93. 9 Geo. 3, c. 16. 21 Jac. 1, c. 2, § 1. *People v. Arnold*, 4 Comst. 508.) (5.) The statute of limitations cannot be set up by the corporation of Trinity church. The statute in respect of actions brought by the people, limits the bar to cases where the defendant is a "person." This term does not include a body corporate, as do the terms used in the residue of the statute. (*St.* 3 and 4 Wm. 4, c. 27, § 1. 1 *Granger's Supt.* 450. 2 R. S. 292, § 1. 1 *id.* 768, § 3. 2 *id.* 703, § 34. *Smith's Com.* 688, § 544. *Betts v. Maynard*, 1 *Breese's Ill. Rep.* 11, 14.) This provision being a concession by the government of its prerogative as sovereign, is not to be enlarged by construction; and the legislature cannot be presumed to have intended to confer upon corporations, which are restricted to the privileges plainly given to them, a favor which it would be ready to bestow upon individual citizens.

*G. M. Ogden, Wm. M. Evarts and A. J. Parker*, for the defendants. I. The plaintiffs show no title whatever to the premises in question. (a.) There is no presumption of title in favor of the state, except where lands are *vacant*, or are proved to have been vacant within forty years. (*Wendell v. The People*, 8 *Wend.* 183. *People v. Denison*, 17 *id.* 312. *People v. Van Rensselaer*, 5 *Seld.* 319.) (b.) In this case the plaintiffs show affirmatively that the premises are not only occupied, but that they have been occupied by the church since the lease of 1697—162 years. That the church took possession under its lease, appears from the fact that it leased the whole farm to Ryers in 1704. This, with the "information" of 1713, the address to the crown in 1714, letters, statutes, &c., the report of Mr. Yates in 1785, and other papers introduced by the plaintiffs, traces the possession of the church all the way down to the present time, when the

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church is still found receiving the rents. Even on the plaintiffs' theory of presumption, it could not be available against such positive evidence of the defendants' continued possession. (c.) When the church is once shown to be in possession, the possession will be presumed to have continued, till the contrary is shown. It could, therefore, be presumed the church had been in possession ever since it leased to Ryers, even if there were no proof of subsequent possession. (1 *Greenl. Ev.* § 41.) (d.) A complaint by the people which did not aver the plaintiffs in possession within forty years, was held bad on demurrer. (*The People v. Clarke*, 10 *Barb.* 120.) Of course, the same state of facts proved will not sustain the action.

II. It was not necessary for the defendants to prove a title to the premises. There was nothing shown to put the defendants on their defense. The plaintiffs must recover, if at all, on the strength of their own title. (*Martin v. Strachan*, 4 *Term Rep.* 107, n. *Goodtitle v. Baldwin*, 11 *East*, 494. 3 *Phil. Ev.* 581, *Edwards' ed.* 2 *Greenl. Ev.* § 381.)

III. The plaintiffs have not only failed to show title in the state, but they have, in fact, shown the title to be in Trinity church. (a.) They have proved the leases to the church of 1697 and 1702, and the documents introducing them have also shown that the farm was granted by lease in fee to the church, in the fourth year of Queen Anne, (1705,) at the yearly rent of three shillings. The information of 1813 was filed for arrearages of *quit-rent*, thus recognizing the lease to the church, by claiming rents under it. The grant of 1705 was fully described in the address of 1714. It is also described in Yates' report, as bearing date 23d November, 1705. (b.) If it is claimed that by the colonial act of 1699 the previous seven years' lease was vacated, and the colonial governor was forbidden to make any lease except for his own time, we answer that that act was repealed by the colonial act of 27th November, 1702. (1 *Bradford's Col. Stat.* 196. *Van Schaick's Laws*, 31, 51.) This being a matter of law;

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and a public statute, we have a right to show it by reference to the statutes. It is also shown by documents introduced by the plaintiffs. (c.) It does not affect the question, that the act of 1699 was approved and the repealing act of 1702 disapproved by the home government in 1708, because the grant of 1705 was made while the repealing act was in full force, and every thing done under the act before its disapproval or repeal by the home government is valid. (*Bogardus v. Trinity Church*, 4 *Sandf. Ch. R.* 737. *Sedgwick on Statutes*, 454. *Report Commissioners of Land Office*, May 12, 1836, p. 11.) All the royal commissions provided that the colonial statutes should be valid till disapproved by the crown. (*Smith's History of N. Y. ed. of 1830, vol. 1, p. 353. 3 Col. Doc. 828, 9. 5 id. 5, 11, 94, 267, 393.*) (d.) Independent of the proper title thus shown, the defendants being proved to be now in possession, are to be deemed the lawful owners, till the contrary is proven. Possession is *prima facie* evidence of a seisin in fee. This presumption cannot be overcome by any other presumption, but only by proof of title in the plaintiffs. (3 *Phil. Ev. by Edwards*, 595. 2 *Greenl. Ev.* § 391. *Tappscott v. Cobb*, 11 *Grattan*, 172.) (e.) Under the first point, subdivision (b), it is shown that the church has been in possession 162 years. Forty years only would have given it a title by adverse possession. (1 *Rev. Laws*, 1813, p. 184. 2 *R. S.* 292. *Code*, § 75.)

IV. Rights under grants from the British crown are sacred under the 30th section of the state constitution of 1777, and the state government has no power to question the validity of such a grant, even by *scire facias*. (*The People v. Clarke*, 10 *Barb.* 120, 141. 5 *Seld.* 349, 360.) The 433d section of the code only applies to grants made by the people of this state. If the validity of such a grant cannot be questioned directly by *scire facias*, it cannot certainly be done indirectly by ejectment.

V. The original entry, under a lease for seven years, does not prevent the defendants setting up an adverse possession.

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At the expiration of twenty years from the termination of the lease, the church will be deemed as holding adversely. (a.) The possession of the tenant is deemed the possession of the landlord, until the expiration of twenty years from the termination of the tenancy, or twenty years from the last payment of rent, *and no longer*. At the end of that time the possession will be deemed adverse. (2 *R. S.* 294, § 13. 3 *id.* 5th ed. 504.) (b.) The payment of quit-rents is not inconsistent with an adverse possession, that is, adverse as to the title subject to the quit-rents. (*People v. Van Rensselaer*, 5 *Seld.* 342.) A grantee may hold adversely to his grantor. (*Id.* 343. *Osterhout v. Shoemaker*, 3 *Hill*, 518. 7 *Wheat.* 335. 4 *Peters*, 506.) (c.) It was of course competent for the crown, after the lease for a term of years, to make the grant of 1705. It was, in legal effect, a release of the landlord's title to the tenant, like the old form of conveyance by lease and release.

VI. The people are liable to be nonsuited in a civil action. (3 *R. S.* 5th ed. 867.)

VII. The decision at the circuit was correct, and judgment should be rendered for the defendants.

*By the Court*, INGRAHAM, J. In this case the people seek to recover part of the property held by Trinity church in this city. The complaint claims the property as belonging to them, and avers that they were possessed thereof on 1st January, 1856. The answer denies the allegations set up in the complaint, and also avers that no title accrued to the people within forty years, and also that the defendants acquired title in 1786, and have since been in possession thereof.

Upon the trial the plaintiffs proved the occupancy of the premises by some of the defendants, in separate parcels, and rested. The court, on the defendants' motion, dismissed the complaint. From that judgment the plaintiffs appealed. The ground on which the plaintiffs claimed to maintain the action, on this evidence, was that the people were the presumptive

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owners of all lands in the state, until title in another was shown, and that in ejectment it was not necessary for the people to prove title, in the first instance. The cases of *The People v. Van Rensselaer*, (5 *Selden*, 291,) and *The People v. Arnold*, (4 *Comst.* 508,) are relied on to establish this proposition. The first of these cases was brought to recover vacant lands, and in that case it was said it was enough for the people, in the first instance, to prove that the premises in dispute were vacant and unoccupied within the 40 years, and that the defendant subsequently entered and made claim to them. The latter case was on demurrer, and did not present the question now before the court. The only question there was as to the sufficiency of the answer, and that pleading was held to be good. The answer in the present case appears to have been drawn after that one.

In *Wendell v. The People*, (8 *Wend.* 183,) the premises claimed were proved, by the attorney general, to have been vacant and unoccupied within 40 years previous to the trial, and there the presumption in favor of the state was held to be sufficient to put the defendants on their defense.

In *The People v. Denison* (17 *Wend.* 312) the same rule was adopted, and the court held that such proof of the premises being vacant was sufficient, in the first instance. But in no case to which we have been referred has such presumption of title been considered sufficient, without such proof of the lands being vacant within the period of limitation. If this is necessary in regard to unoccupied lands, to warrant the presumption of title in the state, without proof of title, how much more necessary to require the state to show some title, or the absence of any possession by others within 40 years, where, in order to maintain the action, it is necessary for the plaintiffs to prove that the defendants were occupying the property as tenants of a third party. Where proof is furnished of a tenant being in possession, the presumption is a fair one that such possession is legal; and until the plaintiffs show some right to the possession within 40 years, they do

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not furnish sufficient evidence to dispossess the defendants of the property claimed.

In *The People v. Van Rensselaer*, above referred to, Judge Willard says, "At the time the counsel for the people rested the case, there was no sufficient evidence before the court to entitle the plaintiffs to recover, or to require the defendants to be put upon their defense. First, there was no proof that the premises were vacant," &c.

It is apparent that in that case such evidence was deemed necessary before the presumption of title in the people could be resorted to against the defendant in possession of, or even claiming, the property. On the trial of this case, no evidence of title, or of vacant possession, was offered by the plaintiffs. One or the other was necessary, to warrant a recovery, and the court was not in error in dismissing the complaint, for want of such evidence.

The judgment should be affirmed.

[NEW YORK GENERAL TERM, December 18, 1859. *Roosevelt, Sutherland and Ingraham*, Justices.]

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## MILLS &amp; RAY vs. BLOCK and others.

A creditor who has commenced an action at law, for the recovery of his debt, in which an attachment has been issued and levied upon the property of the debtor, cannot bring a second action in the supreme court, for the recovery of his debt, to set aside an alleged fraudulent judgment previously recovered against the debtor, and for an injunction to restrain the paying over of the proceeds of a sale of property levied upon by virtue of an execution issued on such judgment. ROOSEVELT, P. J., dissented.

In such a case the creditor must wait until he has established his debt by judgment, before he will be entitled to an injunction, or other equitable relief against the judgment alleged to be fraudulent.

And it seems the creditor has a complete remedy *at law*, by proceeding with the attachment suit, obtaining a judgment therein, and selling the property, under it.

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Mills v. Block.

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**A**PPEAL from an order denying a motion made by the defendant Block, to dissolve an injunction. The complaint alleged that on the 30th of March, 1859, the defendant Moise Franck being indebted to the plaintiffs in the sum of \$428.21, for goods sold and delivered, the plaintiffs commenced an action in this court against him, for the recovery of the debt. That an attachment was issued in the action, directed to the sheriff of New York, by virtue of which the sheriff duly levied upon and seized a large amount of goods, the property of Franck. That prior to the commencement of the said action of the plaintiffs and the issuing of the attachment therein, and on the 25th of March, 1859, a judgment was entered in this court, in favor of the defendant Block, for \$5389.50, against said Franck, and an execution thereon issued against the property of Franck, directed to the sheriff of New York, under and by virtue of which the sheriff levied upon the said property of Franck; the levy being made before the plaintiffs' attachment was levied thereon. That the sheriff had advertised the property so levied on, for sale, upon the execution. The plaintiffs alleged, on information and belief, that the said judgment was obtained fraudulently and by a fraudulent combination and collusion by and between Franck and Block to have the judgment entered for the purpose of defrauding the creditors of Franck, and of defrauding the plaintiffs; and that the said judgment was not founded on any real or actual indebtedness of Franck to Block, &c. And the plaintiffs claimed and insisted that such judgment was, upon its face, fraudulent and void as to the creditors of Franck. And they prayed for an injunction to restrain the defendants from making any disposition of the proceeds that might arise from the sale of the property under said execution, until the further order of the court; and that the sheriff of New York, his deputies, &c. might be restrained from paying over to Block, or any other person, any money that might be realized from, or the proceeds of, the sale that might be made on the execution. A receiver was also prayed for. The defendants an-

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swered, separately. An injunction having been issued, as prayed for, the defendant Block moved, at a special term, to dissolve the same. His motion was denied, with costs.

*D. Evans*, for the plaintiffs.

*F. H. B. Bryan*, for the defendant Block.

SUTHERLAND, J. On the plaintiffs' own showing, in their complaint, they are not entitled to any of the equitable relief asked for by the complaint.

The action is brought for the benefit of themselves alone, and not for the benefit of themselves and all other creditors of the defendant Moise Franck.

The plaintiffs have not established their debt by judgment, and they could not reach Franck's property by execution, if the alleged fraudulent judgment, execution and levy under it, which they have permitted Block to obtain, were at once declared fraudulent and void, and were removed out of their way.

Although it appears from the plaintiffs' complaint, that prior to the commencement of this action they commenced an action at law for their debt, in which an attachment was regularly issued, and, as they allege, properly levied on the property of Franck, fraudulently disposed of, or intended to be disposed of, by and under the fraudulent judgment, yet they also ask for a judgment for their debt in this action; and in the mean time, and until such judgment shall be obtained and the fraudulent judgment be declared fraudulent and removed, they ask that the defendants Franck and Block, and the sheriff, may be restrained by injunction from proceeding under the alleged fraudulent judgment, execution, &c.

The plaintiffs ask for this injunction, and that Block's judgment may be declared fraudulent and void, on the ground that they have acquired a *lien* on the property, by their attachment.

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I much doubt whether their attachment has been levied so as to give them this *lien*; for it appears from the complaint that their attachment was delivered to the sheriff after the execution on Block's judgment had been issued and levied by the same sheriff, and that the sheriff held the property under the execution when the attachment was delivered to him, and he is alleged to have levied on it under the attachment. I do not see how a sheriff can hold property under an execution with one hand, and levy on it with an attachment in the other hand, the property then being in the custody of the law.

But conceding that the levy under the attachment was legal and proper, and that the plaintiffs did thereby acquire a lien, I am not aware of any case in which it has ever been held that such a lien gave them a right to ask for the injunction and the other equitable relief asked for in this action. In *Falconer v. Freeman* (4 Sandf. Ch. R. 565) the attachment was issued under the revised statutes, and the action was for the benefit of the plaintiffs and all other creditors of the defendant.

It would appear to be perfectly settled, that the plaintiffs must wait until they establish their debt by judgment, before they will be entitled to the injunction and the other equitable relief asked for in their complaint. (*Wiggins v. Armstrong*, 2 John. Ch. R. 144. *Reubens v. Joel*, 3 Kernan, 488.)

Besides; why, on the plaintiffs' own showing, have they not a complete remedy at law. Assuming that their attachment was regularly issued, and properly levied, so as to give them a lien, it as effectually restrains any disposition of the property until they obtain their judgment, as an injunction would; and when they do obtain their judgment, they can proceed and sell under it, at the peril and risk of being able to show that Block's judgment is fraudulent and void.

I think the injunction, which was granted in this action, was improperly granted, and that the order appealed from denying the motion of the defendant Block, that the injunction be dissolved, should be reversed with costs.

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I cannot see that the act of 1857, authorizing an attachment to issue on the ground that the debtor "has removed, or is about to remove, any of his property from the state with intent to defraud his creditors, or *has assigned, disposed of, or secreted, or is about to assign, &c.* any of his property with like intent," has any bearing on the question.

CLERKE, J., concurred.

ROOSEVELT, P. J., dissented.

Order appealed from, reversed.

[NEW YORK GENERAL TERM, December 23, 1859. *Roosevelt, Clarke and Sutherland, Justices.*]

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THE CUMBERLAND COAL AND IRON COMPANY *vs.* SHERMAN,  
DEAN and POSTLEY.

An agent, employed to examine and ascertain how much and what part of the lands of his principal can be sold without inconvenience, and to set off by metes and bounds such portions as he in his judgment shall deem advisable, and to report his proceedings to his principal, cannot, after examining the property and recommending a sale of a portion thereof, purchase the property himself, and take a conveyance thereof for his own benefit.

And if such agent, after so purchasing the property, organizes a company, in which he becomes a director and a large stockholder, and transfers and conveys the land, and assigns a contract relating to it to such company, the company will be charged with notice of the facts and circumstances attending the purchase by its grantor, and will stand in no better position than he occupies.

Under such circumstances, the principal is entitled, at his option, to have the sale to its agent vacated and set aside, both as against the agent himself, and those to whom he has conveyed with notice of the facts.

And, as an agent is incapacitated to purchase for himself, so is he also incapacitated to act for another person, in making the purchase.

A director of a corporation is the agent or trustee of the stockholders, and as

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such has duties to discharge, of a fiduciary nature, towards his principal; and is subject to the obligations and disabilities incidental to that relation. What will amount to a confirmation or ratification, by the stockholders of a corporation, of a sale made by its directors.

THE plaintiffs are a corporation created by the laws of the state of Maryland, for the purpose of mining coal, transporting and selling the same, &c. On the 21st of February, 1855, the defendant Sherman was elected a director of the company, and continued to act as such until the 29th of May, 1858, when he resigned. The complaint in this cause was filed December 6, 1858, against the defendants Sherman and Dean, and the Hoffman Coal Company, a corporation also created by the laws of the state of Maryland. It was afterwards amended, by striking out, as parties defendants, the Hoffman Coal Company; and the defendant Postley was made a defendant by a supplemental complaint. The complaint alleged that Andrew Mehaffey was president of the plaintiffs from 20th March, 1854, to June 7th, 1858, and acted as treasurer until May 1st, 1858; that the defendant Sherman, on April 4th, 1855, was appointed chairman of a committee to prepare by-laws; that as such, at a meeting of the stockholders, June 4th, 1855, he reported certain by-laws which were adopted, whereby an executive committee was constituted, consisting of three directors, and the president was vested with the exclusive power of constituting said committee; that the same was appointed, composed of said Sherman, Francis Bloodgood and Joseph Torrey, and the president was made *ex officio* a member of said committee and chairman thereof; and said committee continued to act until 29th May, 1858; that said Sherman took an active, leading and influential part in the affairs of said company; and that said executive committee assumed to transact most of the ordinary business of the company. That at a meeting of the board of directors of the company on the 9th of October, 1855, he, Sherman, offered a resolution, which was adopted, authorizing the president to appoint a committee of five directors, whose duty it

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was made to proceed to Maryland, and ascertain how much and what part of their coal lands could be sold without interfering with the working facilities of the company; and, if practicable, that they set off by metes and bounds such portions as they in their judgment should deem advisable, and report their proceedings to the board at the earliest practicable day; that said Mehaffey, as such president, appointed said Sherman chairman of said committee, and appointed as the other members thereof Joseph Torrey, M. N. Falls, William Pettet and Francis Bloodgood; that said Mehaffey was added to the committee as a member thereof; that the only members of the committee who acted were said Sherman, Pettet and Mehaffey; and that they visited the lands of the company for the purpose indicated in the resolution. That at a meeting of the board on the 11th December, 1855, the said committee, in the name of Sherman as their chairman, presented a report, stating that three of their members had visited said mines—leaving New York on the 19th of November—and had examined the same, and recommended a sale of 1548½ acres, which they had described by sufficient metes and bounds for a conveyance by deed. They thought the same might be sold at a fair price, and upon such terms as would enable the company to make all necessary arrangements for the development of the resources of the company. That at the same meeting of the directors of the company, a resolution was passed authorizing the president and secretary to accept an offer, should such be made, of not less than \$200,000 for the lands referred to in the report, and to convey the same by deed to the purchaser or purchasers, with such reservations, stipulations and covenants as they might deem necessary. At a meeting of the directors on the 15th January, 1856, a resolution was passed, reciting that the stockholders had authorized and directed a sale to be made of part of the company's lands; that it was believed a sale of a portion of them would be advantageous to the company, and that the board, by resolution of December 11, 1855, had authorized a sale of a portion of

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such lands at a certain price, which had been found impracticable, and it was understood that a sale could be made of a less quantity for \$150,000, or thereabouts; therefore it was resolved, that the president and secretary be authorized to make such sale, by executing a deed of the land to be sold, and make and execute such covenants and agreements on behalf of the company as they might deem necessary; and the president was authorized to make such modifications in the terms and conditions of the sale as he might deem necessary. That on the 22d of April, 1856, a deed was executed to Sherman and Dean by said company, conveying to them 1215 acres of said lands, for the price or consideration of \$140,000; of which \$28,000 was stated in the deed to have been paid to the company, and the balance, \$112,000, by the said Sherman and Dean assuming to pay 112 bonds of the company of \$1000 each, the payment of which had been extended to January 1, 1864, with interest thereon at the rate of six per cent, payable semi-annually. An agreement was also executed on the part of the company, of the same date as the deed, with Sherman and Dean, securing to them important advantages in the use of the railroad and other property of the company. At a meeting of the board of directors, 13th May, 1856, it appears from their minutes that the president stated that a sale of a certain portion of the lands of the company had been made to Sherman and Dean, and two agreements and the deed for the lands had been executed, and the action of the president and secretary in the matter was unanimously approved.

The complaint charged that the price at which said lands were sold was grossly inadequate, and that no part of the consideration therefor was ever paid to the plaintiffs.

The complaint further charged, that the rates of transportation provided in said contract to be paid by Sherman and Dean, afforded no compensation whatever for the services rendered; that said rates were, in fact, less than the actual expenses of the railroad in doing the work, and that every ton of coal transported, according to said rates, was an injury and

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loss to the plaintiffs. The complaint further charged, that Mehaffey, the president of the company, falsely and fraudulently stated in his report of June 3, 1856, made to the meeting of the stockholders then held, that the \$140,000, being the consideration of said sale, had been paid in cash; and that he had appropriated \$112,000, part of the proceeds of said sale, to the extinguishment of that amount of bonds of the company, leaving of the \$467,000 of bonds of the company \$355,000 as the *entire* debt of the company. That the said Sherman, in connection with the defendant Postley and three others, on the 19th of August, 1858, organized a company under the laws of Maryland, for the mining and transportation of coal, called the Hoffman Coal Company; and that on the 20th day of August, 1858, the said Sherman and his wife and said Dean conveyed the lands, so conveyed to them by the plaintiffs, by deed dated April 22, 1856, to said Hoffman Coal Company, and had executed, or were about to execute, an assignment to said Hoffman Coal Company of said transportation contract. That said Sherman and Dean became subscribers to 4990 shares of the capital stock of said Hoffman Coal Company, which capital consisted of 5000 shares of \$100 each, and that the other ten shares were held nominally by the other persons named, to make them directors. That the company had full notice of all the acts and transactions of Sherman and Dean in obtaining said deed and contract, and that although the same were nominally transferred to said company, Sherman and Dean in fact continued to own the same.

Wherefore the plaintiffs demanded judgment that said deed and contract might be declared fraudulent and void as to them, and that the same be delivered up to be canceled, and that in the meantime, and until the final hearing of this cause, the said Sherman and Dean be enjoined and restrained from selling or conveying the same, and otherwise as prayed for in the complaint. The supplemental complaint stated that the defendant Postley was president of the said Hoffman Coal Company, and had possession of said deed and contract.

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That Dean was a clerk in an office with the said William Pettet, or in some way connected in business with him; that Dean was a man of little or no pecuniary responsibility; and that he held his interest in said deed, contract, and in the Hoffman Coal Company, in secret trust for some of the directors of the plaintiff, at the time said deed and contract were executed.

On the complaint, a temporary injunction was granted, and an order to show cause why the same should not be continued until the hearing of the cause. On this motion, affidavits were read on the part of the defendants Sherman, Dean and Postley. All the allegations of fraud charged in the bill were denied. The sale and conveyance to Sherman and Dean were admitted, and the making of the contract for transportation. Sherman and Dean both say that they did not know each other till they met to consummate the arrangements, and execute the contract.

There was no denial in the opposing affidavits of the charge in the complaint, that the price at which said lands were sold was grossly inadequate. The affidavits alleged that at a meeting of the stockholders on the first of June, 1857, the said sale of lands, and said contract, were ratified by the stockholders, except in some particulars, which were modified, at the suggestion of some of the stockholders, by Sherman and Dean. The affidavits did not deny the allegation of the complaint, as to the report made by Mehaffey to the meeting of the stockholders in June, 1856, that the consideration of the deed, being \$140,000, had been paid in cash, and that with a portion of it he had extinguished \$112,000 of the bonds of the company; nor did said affidavits allege that, previous to said ratification or approval, the truth in that respect had been communicated to the stockholders, or was known to them.

The affidavits alleged that Sherman was solicited by several of the stockholders to become the purchaser of said lands, and that they could not have been sold, if he had not been willing to join in the purchase. Sherman stated that he was a man

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of pecuniary responsibility, but no allegation was made in the affidavits as to the means or responsibility of Dean. There was no denial of the allegations of the complaint, as to the formation of the Hoffman Coal Company, of the amount of its capital stock, and of the proportions thereof held by the defendants Sherman and Dean.

*C. A. Rapallo* and *S. J. Tilden*, for the motion.

*L. R. Marsh* and *E. W. Stoughton*, in opposition.

DAVIES, J. The question presented for my decision is, whether I will dissolve the preliminary injunction granted in the cause, or continue the same till the hearing.

If the plaintiffs have made out a *prima facie* case for the relief asked for in the complaint, they are entitled to the remedy asked for ; or in the language of § 219 of the code, if it shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission of some act, the commission of which during the litigation would produce injury to the plaintiff, a temporary injunction may be granted to restrain such act.

The solution of the question depends upon the fact whether or not the plaintiffs have made out an apparent right to the relief demanded. They insist that they have. That it appearing that the defendant Sherman was, at the time he became the purchaser of the lands conveyed by deed of April 22, 1856, and of the privileges and advantages secured by the contract of the same date, the agent and trustee of the plaintiffs, he was incompetent to purchase said land ; and by reason of such inability, the plaintiffs have the legal right to have said deed and contract canceled, and the lands reconveyed to them, and be restored to all things which they have lost by reason of the acts of their agent and trustee, in making said sale and contracts. That the defendant Dean is a representative man, having no personal interest in the matter, and that

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he took title and became a party to the contract knowing the relation of the defendant Sherman to the plaintiffs; and that in fact he paid nothing on account of such purchase, and incurred no liability in reference thereto, beyond uniting with the defendant Sherman, in guarantying 112 bonds of the plaintiffs for \$1000 each, and assuming the payment of the principal when due, and the interest thereon. That the defendant Postley is the president of the Hoffman Coal Company, and that said company took the conveyance of the lands and the assignment of said contract, with full notice of all the facts and circumstances attending the obtaining them from the plaintiffs.

From the facts not denied before me, it appears that Sherman organized the Hoffman Coal Company in August, 1858, and that he became one of its directors, and he and Dean owned 4990 shares of the 5000 shares of its capital stock. It is therefore too clear to need illustration, that whatever knowledge they had of these transactions, the Hoffman Coal Company had. They were its creators; they breathed into it life, and gave it all it had, and owned the whole of it at its creation, and all but a small fragment after; and, therefore, what they knew their creature knew.

It is well settled that notice to either of the directors of a bank or company, while engaged in its business, is notice to the principal, the bank. (*Angell & Ames on Corporations*, 299, and cases there cited.) So, also, it is well settled, both in law and in equity, that notice to an agent in the transactions for which he is employed, is notice to the principal; and this rule applies as well to a corporation as to a natural person. (*Same authority*.) With much more force does the rule apply, when the principal—in this case, the stockholders—have full and ample notice. It must therefore be assumed that the defendant Postley, as president of the Hoffman Coal Company, stands in no better position before this court than the other defendants.

Next, as to the defendant Dean. It appears from his state-

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men, and that of the defendant Sherman, that the sale, terms, price and all the arrangements, were concluded, and the contract drawn and agreed upon, and all the papers ready for execution, before Sherman and Dean became acquainted with each other; and that acquaintance was first made when they met for the execution of the papers. It is charged in the complaint that Dean has never paid any thing to the plaintiffs on account of said purchase, and that, as alleged in the supplemental complaint, and not denied, he is a clerk, and a man of little or no pecuniary responsibility. It would appear that, at this meeting to sign these papers, he entered into a guaranty with the defendant Sherman, with whom, before, he was totally unacquainted, to guaranty with him, and did guaranty the payment of \$112,000 of the bonds of the plaintiffs, and the payment of the annual interest thereon for eight years; and which interest amounted in all to the sum of \$53,760. The readiness with which he entered into liabilities to such an amount, with a total stranger, gives countenance to the allegation that he was a man of little or no pecuniary responsibility.

It is also alleged in the complaint, and not denied, that whatever has been paid on account of said purchase money, was paid by the defendant Sherman. I have no hesitation in arriving at the conclusion, from all the facts before me, that if Dean entered into these transactions on his own account, he did so with full knowledge of the relation of the defendant Sherman to the plaintiffs; and if he acted as the mere agent of others, his principals must have been cognizant of every particular connected with the sale and purchases, if they were not, in fact, actors in them. Dean, in his affidavit read on this motion, says, "that he had no acquaintance, consultation or communication with the defendant Sherman, until the bargain was made and the terms concluded for the purchase of the said property, conveyed by said deed of 22d of April, 1856, and the said transportation contract of same date, nor until the parties came together to have the same executed." Dean denies all fraud on his part, or knowledge that any was per-

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petrated by the defendant Sherman; but I cannot resist the conviction that he knew, and, if he acted for others, that they well knew, that Sherman was, at the time, a director of the plaintiffs.

The rule in reference to the dealings of an agent or trustee, in reference to property committed to his management or care, is clearly and well laid down by Sir Edward Sugden, in his work on Vendors and Purchasers. (2 *Sug.* 109, *Lond. ed.* of 1824.) It is in these words: "It may be laid down as a general proposition, that trustees, unless nominally such to preserve contingent remainders—agents, commissioners of bankrupts, assignees of bankrupts, solicitors to the commission, auctioneers, creditors who have been consulted as to the mode of the sale, or any person who by their connection with any other person, or by being employed or concerned in his affairs, have acquired a knowledge of his property—are incapable of purchasing such property themselves, except under the restraints which will shortly be mentioned. For if persons having a confidential character, were permitted to avail themselves of any knowledge acquired in that capacity, they might be induced to conceal their information and not to exercise it for the benefit of the persons relying upon their integrity. The characters are inconsistent. *Emptor emit quam minimo potest, venditor vendit quam maximo potest.*"

Mr. Justice Wayne, of the supreme court of the United States, in *Michoud v. Girod*, (4 *How.* 554,) in delivering the opinion of the court, cites this rule with approbation, and says: "It has been adopted by almost every subsequent writer, and we cite the passage with confidence, having verified its correctness by an examination of all the cases cited by him; by an examination also of other cases in the English courts, and of cases in the courts of chancery of several of the states in our union, sustaining the doctrine, to the fullest extent, of the incapability of trustees and agents to purchase particular property, for the sale of which they act representatively, or in whom the title may be for another."

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He adds, in the same case, that "the general rule stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self interest and integrity. It restrains all agents, public and private; but the value of the prohibition is most felt, and its application is more frequent, in the private relations in which the vendor and purchaser may stand towards each other. The disability to purchase is a consequence of that relation between them, which imposes on the one a duty to protect the interests of the other; from the faithful discharge of which duty, his own personal interests may withdraw him. In this conflict of interest, the law wisely interposes. It acts not on the possibility that, in some cases, the sense of that duty may prevail over the motives of self interest; but it provides against the probability, in many cases, and the danger, in all cases, that the dictates of self interest will exercise a predominant influence and supersede that of duty. It, therefore, prohibits a party from purchasing on his own account that which his duty or trust requires him to sell on account of another, and from purchasing on account of another that which he sells on his own account. In effect, he is not allowed to unite the two opposite characters of buyer and seller, because his interests, when he is the seller or the buyer on his own account, are directly in conflict with those of the person on whose account he buys or sells." (2 *Burge's Com.* 459.)

The cases relating to the dealings of an agent or trustee with the property, in reference to which his agency or trust exists, may be arranged into two classes: *First.* Cases in which a trustee buys or contracts with himself, or several trustees of which he is one, or a board of trustees of which he is one; and it will be seen by reference to the authorities hereinafter cited, that the incapacity to purchase applies to all these cases. *Second.* Cases in which a trustee buys or contracts with his *cestui qui trust* who is *sui juris*, and is competent to deal independently of the trustee, in respect to the trust estate.

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As to the first class of cases, the purchase or contract is voidable at the option of the *cestui qui trust*, without reference to the fairness or unfairness of the purchase or contract. For the reasons before given, the disqualification of the party purchasing or contracting is a conclusion of law, and is absolute. The leading case in this state, and which has been followed without qualification, so far as I have been able to ascertain, is that of *Davoue v. Fanning*, (2 *John. Ch. Rep.* 252.) In that case, an executor, on making sale of the real estate of his testator, caused the same to be purchased for his wife, and conveyed to her. The sale was made at public auction and for a fair price, and was *bona fide*. Yet the sale was set aside at the instance of the *cestui que trust*; and it will be observed that the trustee was not the purchaser, but a third person, for the benefit of his wife. Chancellor Kent says, "whether a trustee buys in for himself or his wife, the temptation to abuse is nearly the same. Though the money he was raising was to go to his wife, it was no reason why he should be permitted to buy in for her the *estate itself*. His interest interfered with his duty. \* \* \* The case, therefore, falls clearly within the spirit of the principle, that if a trustee, acting for others, sells an estate, and becomes himself interested in the purchase, the *cestui que trust* is entitled to come here, *as of course*, and set aside that purchase, and have the property re-exposed to sale." Chancellor Kent then proceeds to review the cases bearing on this point, commencing with that of *Holt v. Holt*, in the time of 22 Car. 2, where it was held that if an executor renew a lease in his own name on its expiration, the renewed lease is to be for the benefit of the *cestui que trust*.

And in *Davison v. Gardner*, in 1743, Lord Hardwicke observed, that the court always looks with a jealous eye at a trustee purchasing of his *cestui que trust*; and in *Whelpdale v. Cookson*, in 1747, (1 *Vesey*, 9; *S. C.*, 5 *id.* 682,) the chancellor would not permit a purchase at auction to stand, as he said he knew the dangerous consequence of sanctioning

dealings of a trustee with the property of the *cestui que trust*. In *Campbell v. Walker*, (5 Ves. 678,) the master of the rolls says, "I will lay down the rule as broad as this, and I wish trustees to understand it, that any trustee purchasing trust property is liable to have the purchase set aside, if, in any reasonable time, the *cestui que trust* chooses to say he is not satisfied with it." He adds, "They must buy with that clog."

The numerous cases cited by Chancellor Kent show the uniformity of the rule, not only in the English courts, but in our own and those of our sister states. The rule in this state has been settled by the highest court therein. In *Munro v. Allaire*, (2 Caines' Cases in Error, 183,) Benson, justice, in delivering the opinion of the court, says: "It is a principle that a trustee can never be a purchaser, and I assume it as not requiring proof that this principle must be admitted, not only as established by adjudication, but also as founded in indispensable necessity, to prevent that great inlet of fraud, and those dangerous consequences which would ensue if trustees might themselves become purchasers, or if they were not in every respect kept within compass. Although it may, however, seem hard that the trustees should be the only persons of all mankind who may not purchase, yet, for the very obvious consequences, it is proper that the rule should be strictly pursued and not in the least relaxed." Chancellor Kent says that he cannot but notice the precision and accuracy with which the rule and the reason of it are here stated.

Chancellor Kent says that there is one more important case, that of the *York Building Company v. Mackenzie*, decided in the house of lords in 1795, on appeal from the court of session in Scotland. It had then only appeared in 8 Bro. P. C. by Tom., in App., but has since been reported in 3 Paton, 378. He says of this case, that it is a complete vindication of the doctrine he was there applying; and he remarks that, considering the eminent character of the counsel who were concerned and who had since filled the highest judicial stations, and the ability and learning which they displayed in

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the discussion, it is, perhaps, one of the most interesting cases, on a mere technical rule of law, that is to be met with in the annals of our jurisprudence. He says the reasons of the house of lords for setting aside the sale are not given, and we are left to infer them from the arguments upon which the appeal was founded. They have now appeared in the eloquent and learned opinions of Lord Thurlow and Lord Chancellor Loughborough. The perusal of these opinions would have satisfied the learned Chancellor that his views of the case, as one of high authority and great interest, were eminently correct. The appellants were an insolvent company, and their estate was sold by the order of the court of session, at a public judicial sale, to satisfy creditors. The course, at such sales, is to set up the property at a value fixed upon by the court, which is called the up-set price, and which is founded on information procured by the common agent of the court, who has the management of all the outdoor business of the cause. The respondent in the case was the common agent, and he purchased for himself at the up-set price, no person appearing to bid more, and the sale was confirmed by the court; and in the course of eleven years' possession he had expended large sums for building and improvements. There was no question as to the fairness or integrity of the purchase. The object of the appellant was to set aside the sale, on the ground that the purchaser was the common agent in behalf of all parties to procure information and attend the sale, and was in the nature of a trustee, and so disabled to purchase. On the part of the appellants, it was contended that the sale in question was *ipso jure* void and null, because the respondent, from his office of common agent, was under a disability and incapacity, which precluded him from being a purchaser. The office of common agent, in a ranking and sale, infers a natural disability, which, *ex vi termini*, imparts the highest legal disability, because a law which flows from nature, being founded on the reason and nature of the thing, is paramount to all positive law. The principle is obvious. He cannot be both judge and

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party. He cannot be both seller at a roup and buyer; he cannot serve two masters. These views were not controverted by the counsel on the other side, but they insisted the sale could be maintained upon other grounds. After an argument of sixteen days, the case was decided in the house of lords, opinions being given by Lord Thurlow and Lord Chancellor Loughborough. Lord Thurlow said, on this point, that all the gentlemen admit that it was the duty of the agent to carry on the sale to the utmost advantage, for the benefit of the creditors, and those interested in the residue; and, taking it to be so, one side said, that being your situation, it is utterly impossible for you to perform that duty in such a manner as to derive an advantage to yourself. This seems to be a principle so exceedingly plain, that it is in its own nature indisputable, for there can be no confidence placed unless men will do the duty they owe to their constituents, or be considered to be faithfully executing it, if you apply an arbitrary rule. In these views the lord chancellor concurred, and the sale was set aside. Lord Eldon and Sir W. Grant designate this as *the great case*, and repeatedly refer to it. In *Jeffrey v. Aitken*, decided in June, 1826, the lord ordinary observed, it is impossible to hold that the seller can also be the buyer of the subject, after the judgment of the house of lords in the case of the *York Building Company v. Mackenzie*, decided May 13, 1795.

In *Taylor v. Watson*, decided in Scotland, January 20, 1846, the same rule as laid down in *Mackenzie's case* was reiterated and adhered to. Lord Jeffrey said, "The principle involved in this case is a very familiar and general one in our laws—that no person can be actor in *rem suam*. The stringency of the maxim has been ruled and held settled by the house of lords, in the case of *Mackenzie*. \* \* \* It is now *presumptio juris et de jure*, that where a person stands in these inconsistent relations of both buyer and seller, there are dangers, and it is not relevant to say that it is impossible there could be any in the particular case. I should be sorry

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to think that any doubts were thrown on this rigorous principle which has been established both here and in the other end of the island."

In the case of the *Aberdeen Railway Company v. Blaikie*, July 20, 1854, (1 *McQueen's Rep.* 461,) the house of lords, reversing the judgment of the court below, held that a contract entered into by a manufacturer, for the supply of iron furnishings to a railway company of which he was a director, or the chairman at the date of the contract, was invalid and not enforceable against the company. Lord Cranworth, in delivering the opinion of the court, says: "A corporate body can only act by agents, and it is of course the duty of those agents so to act as best to promote the interests of the corporation, whose affairs they are conducting. Such an agent has duties to discharge, of a fiduciary character toward his principal; and it is a rule of universal application, that no one having such duties to discharge shall be allowed to enter into engagements in which he has or can have a personal interest conflicting, or which possibly may conflict with the interests of those whom he is bound to protect. So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. It obviously is or may be impossible to demonstrate how far, in any particular case, the terms of such a contract have been the best for the *cestui que trust*, which it was possible to obtain. It may sometimes happen that the terms on which a trustee has dealt, or attempted to deal with the estate or interests of those for whom he is a trustee, have been as good as could have been obtained from any other person; they may even, at the time, have been better. But still so inflexible is the rule, that no inquiry on that subject is permitted. The English authorities on this subject are numerous and uniform."

The same subject has had a full and careful discussion and examination in the supreme court of the United States, in the case of *Michoud v. Girod*, cited *supra*. The opinion of the

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court, by Mr. Justice Wayne, is distinguished for its clear analysis and elaborate review of all the cases bearing on the point. He says, "The rule, as expressed, embraces every relation in which there may arise a conflict between the duty which the vendor or purchaser owes to the persons with whom he is dealing, or on whose account he is acting, and his own individual interest." The same rule obtains in the civil law, with some modifications not necessary to notice.

The language of Pothier is distinct and unequivocal: "Nous ne pouvons acheter, ni par nous-mêmes, ni par personnes interposées, les choses que font partie des biens dont nous avons l'administration." (*Tr. du Contrat de Vente, part 1, p. 13.*) The rule of the civil law, without qualification, is adopted in Holland: "Quae vero de tutoribus cautâ, ea quoque in curatoribus pro curatoribus, testamentorum, executoribus, aliis similibus, qui aliena gerunt negotia, probanda sunt." In Spain the rule is enforced without relaxation, and with stern uniformity. Judge Wayne, in the case of Michoud, in his opinion, cited the rule from the *Novissima Recopilacion*, in these words, "No man who is testamentary executor, a guardian of minors, nor any other man or woman, can purchase the property which they administer, and whether they purchase publicly or privately, the act is invalid, and on proof being made of the fact, the sale must be set aside." It is thus seen that the rule by which agents or trustees are prohibited and rendered incapable of purchasing or dealing with the property of their *cestuis que trust*, is one of universal application, justified by a current of strong and high authorities, and is adhered to with stern and inflexible integrity; and the consequence of such dealing and purchasing is, that the agent or trustee is liable at any time, on the application of the *cestui que trust*, and as a matter of course, and without reference to the fairness or unfairness of the transaction, the adequacy or inadequacy of the price paid, or any other equities of the agent or trustee, to have the sale set aside; such has been the uniform administration of the law in England, and where the

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civil law prevails, and in this country. No reason is suggested why rules thus founded on the soundest morals, which have been maintained with such uniformity and steadiness, should now be relaxed. On the contrary, it is seen that every consideration arising from circumstances surrounding us, and the unparalleled multiplicity of corporations, who can only act by trustees or agents, and the very large proportion of the wealth of the country invested in them, and placed under the control and management of agents and trustees, forcibly demands of courts of justice a firm adherence to these principles, and a stern application of them to every case coming within the sphere of their action.

Nay, the rule, as applicable to managers of corporations, should in no particular be relaxed. Those who assume the position of directors and trustees, assume also the obligations which the law imposes on such a relation. The stockholders confide to their integrity, to their faithfulness, and to their watchfulness, the protection of their interests. This duty they have assumed, this the law imposes on them, and this those for whom they act have a right to expect. The principals are not present to watch over their own interests; they cannot speak in their own behalf; they must trust to the fidelity of their agents. If they discharge these important duties and trusts faithfully, the law interposes its shield for their protection and defense; if they depart from the line of their duty, and waste, or take themselves, instead of protecting, the property and interests confided to them, the law, on the application of those thus wronged or despoiled, promptly steps in to apply the corrective, and restores to the injured what has been lost by the unfaithfulness of the agent. This right of the *cestui que trust* to have the sale vacated and set aside, where his trustee is the purchaser, is not impaired or defeated by the circumstance that the trustee purchases for another. This point is fully discussed by Lord Eldon in *Ex parte Bennett*, (10 Vesey, 381.) In this case he held, that as the solicitor to a commission of bankruptcy could not pur-

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chase at a sale of the bankrupt's effects, for the reasons above stated, so a sale made to a person who had requested the solicitor to employ another at the sale to bid for him, was set aside. He said, "If the principle be that the solicitor cannot buy for his own benefit, I agree when he buys for another, the temptation to act wrong is less; yet if he could not use the information he has for his own benefit, it is too delicate to hold that the temptation to misuse that information for another person is so much weaker, that he should be at liberty to bid for another." He adds: "Upon the general rule, both the solicitor and commissioner have duties imposed on them that prevent their buying for themselves; and if that is the general rule, it follows of necessity that neither of them can be permitted to buy for a third person, for the court can, with as little effect, examine whether that was done by making an undue use of the information received in the course of their duty, in the one case as in the other. No court of justice could institute investigation to that point effectually, in all cases, and therefore the safest rule is that a transaction which, under the circumstances, should not be permitted, shall not take effect upon the general principle, as, if ever permitted, the inquiry into the truth of the circumstances may fail in a great proportion of cases." And the sale for this reason was set aside. This case is referred to with approbation by Chancellor Kent, in *Davoue v. Fanning*, (*supra*.) It follows, therefore, that if the defendant Sherman was incapacitated to purchase for himself, he was equally incapacitated to act for the defendant Dean, or any other person, to make the purchase; and on the authority of this case, if Dean was the sole purchaser, the same would be set aside.

There can be no question, I think, at the present time, that a director of a corporation is the agent or trustee of the stockholders, and as such has duties to discharge of a fiduciary nature, towards his principal, and is subject to the obligations and disabilities incidental to that relation. (*Robinson v. Smith*, 3 Paige, 222. *Angell & Ames on Corp.* 258, 260. *Percy v.*

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*Milladon*, 3 *Louis. R.* 568. *Hodges v. New Eng. Screw Co.*, 1 *R. I. Rep.* 321. *Verplanck v. Merc. Ins. Co.*, 1 *Edw. Ch.* 84. *Bedfield on Railways*, 494. *Benson v. Hawthorne*, 6 *Young & Collyer*, 326. *The York and North Midland Railway Co. v. Hudson*, 16 *Beav.* 485. *Aberdeen Railway Co. v. Blaikie*, 1 *McQueen's Rep.* 461.) In the latter case, Lord Cranworth said: "The directors are a body to whom is delegated the duty of managing the general affairs of the company. A corporate body can only act by agents, and it is, of course, the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting." Says Vice Chancellor McCoun, in the case of *Verplanck*, (*supra*,) "But when a corporation aggregate is formed, and the persons composing it, either in virtue of the compact or by the express terms of the charter, place the management and control of its affairs in the hands of a select few, so that life and animation may be given to the body, then such directors become the agents and trustees of the corporation, and a relation is created, not between the stockholders and the body corporate, but between the stockholders and those directors, who, in their character of trustees, become accountable for any willful dereliction of duty, or violation of the trust reposed in them. I see no objection to the exercising of an equity power over such persons, in the same manner as it would be exercised over any other trustees."

Neither are the duties or obligations of a director or trustee altered from the circumstance that he is one of a number of directors or trustees, and that this circumstance diminishes his responsibility, or relieves him from any incapacity to deal with the property of his *cestui que trust*. The same principles apply to him as one of a number, as if he was acting as a sole trustee. It is not doubted that it has been shown, that the relation of the director to the stockholders is the same as that of the agent to his principal, the trustee to his *cestui que trust*; and out of the identity of these relations necessarily spring the same duties, the same danger and the same policy of the law.

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In the language of the plaintiffs' counsel, it is justly said : " Whether it be a director dealing with the board of which he is a member, or a trustee dealing with his co-trustees and himself, the real party in interest, the principal is absent—the watchful and effective self interest of the director or trustee seeking a bargain, is not counteracted by the equally watchful and effective self interest of the other party, who is there only by his representatives, and the wise policy of the law treats all such cases as that of a trustee dealing with himself."

The number of directors or trustees does not lessen the danger or insure security, that the interests of the *cestui que trust* will be protected. The moment the directors permit one or more of their number to deal with the property of the stockholders, they surrender their own independence and self control. If five directors permit the sixth to purchase the property intrusted to their care, the same thing must be done with the others if they desire it. Increase of the number of the agents in no degree diminishes the danger of unfaithfulness. *Whichcote v. Lawrence* (3 Vesey, 740) was a case of several trustees. In this case Lord Loughborough says: " There was more opportunity for that species of management, which does not betray itself much in the conduct and language of the party, when several trustees are acting together. I am sorry to say there is greater negligence where there is a number of trustees."

But it is insisted on the part of the defendants, that the purchase was made at the request of some of the stockholders, and that its alleged ratification at the meeting in June, 1857, by the stockholders, is equivalent to a purchase from them; and this brings me to the consideration of the second class of cases, where the trustee buys of, or contracts with, his *cestui que trust*. In reference to them, the presumption of law is against the validity of the transaction, with degrees of strength varying according to the circumstances; but the trustee is permitted to show affirmatively the fairness of the transaction, and to establish the other conditions necessary to its validity.

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The rule on this point is well summed up in the notes to *Fox v. Mackreth* and *Pitt v. Mack*, in vol. 65 *Law Library*, p. 146. That the trustee is not under an absolute disability to purchase directly from the *cestui que trust*, but all such transactions are scanned in a court of equity with the most searching and questioning suspicion, and will not be sustained unless they appear to have been, in all respects, fair and candid and reasonable. The trustee must show that he took no advantage whatever of his situation; that he gave to his *cestui que trust* all the information which he possessed or could obtain upon the subject; that he advised him as he would have done in relation to a third person offering to become a purchaser, and that *the price was fair and adequate*, and the onus of proving all this is upon the trustee; and these principles apply to all cases where confidence is reposed. To sustain these positions, a large number of authorities are referred to, exclusively American.

Taking, therefore, the ground assumed in the argument, that this was a sale in fact, made by the stockholders, the *cestuis que trust*, does it appear that all these requisites were complied with by the purchaser who stood to them in the relation of confidence? The burthen is on him to establish them, and, if he fails, the sale, though made by the *cestuis que trust*, may be set aside on their application.

Has the trustee shown that he took no advantage whatever of his *cestuis que trust*? That he gave to them all the information which he possessed, or could obtain, in reference to the lands sold to him? I have looked in vain for any evidence that such information as he possessed was communicated to the stockholders. Did he advise them as he would have done if a third person had offered to become the purchaser? No evidence of that character is presented. Has he shown that the price was fair and adequate? He is entirely silent on this point, and by that silence admits the truth of the allegation of the complaint, that the price was grossly inadequate.

I cannot, therefore, upon these facts and principles, say that

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this sale can be upheld, even if it had been made by the *cestuis que trust* directly. But it is said that the stockholders at the meeting of June, 1857, ratified and confirmed the sale and contract. It must be borne in mind, that at this meeting the stockholders were dealing with their trustee, and that all the duties incumbent on him, when negotiating a purchase from his *cestui que trust*, devolved with equal force on him when seeking a ratification of a sale made to him by himself as a trustee, with the aid of his co-trustees. I am now regarding the law as applicable to a ratification made by stockholders themselves, or a majority of them. I shall hereafter consider whether a majority of the stockholders made such ratification, and whether it was competent for the majority to make the same, or to bind the minority. The rules as to confirmation of a sale to a trustee by the *cestui que trust*, are concisely laid down in *Lewin on Trusts*, (97 *Law Lib.* 402.) They are: "1. The confirming party must be *sui juris*, not laboring under any disability, as infancy or coverture. 2. The confirmation must be a solemn and deliberate act—not, for instance, fished out from some expressions in a letter; and particularly when the original transaction was infected with fraud, the confirmation of it is so inconsistent with justice, and so likely to be accompanied with imposition, that the court will watch it with the utmost strictness, and not allow it to stand but on the very clearest evidence. 3. There must be no *suppressio veri*, or *suggestio falsi*, but the *cestui que trust* must be honestly made acquainted with all the material circumstances of the case. 4. The confirming party must not be ignorant of the *law*: that is, he must be aware that the transaction is of such a character that he could impeach it in a court of equity. 5. The confirmation must be wholly distinct from, and independent of, the original contract—not a conveyance of the estate, executed in pursuance of a covenant in the original deed for further assurance. 6. The confirmation must not be wrung from the *cestuis que trust* by distress or terror. 7. When the *cestuis que trust* are a class of persons, as cred-

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itors, the sanction of the major part will not be obligatory on the rest; but the confirmation, to be complete, must be the joint act of the whole body." All these positions are sustained by numerous authorities, and are believed to be sound law, and of universal recognition.

Applying these principles to the present case, has the party seeking the confirmation of the stockholders to this sale and contract, shown that these essential prerequisites have been complied with on his part? I do not understand it to be pretended that all the facts and circumstances of the case were made known to the stockholders at this time. It is not asserted that the statement made by Mehafee to the stockholders, at their meeting in June, 1856, that the whole consideration of this sale, \$140,000, had been paid in money, and that \$112,000 thereof had been applied in the extinguishing of that amount of bonds of the plaintiffs, and which was undeniably incorrect, and well calculated to deceive and impose on the stockholders, was in fact untrue, and they so understood it. Can I assume that the defendant Sherman was ignorant of this report, and this incorrect statement? If he had knowledge of them, it was clearly his duty, when he sought the stockholders to obtain from them a confirmation of this sale, to have made them acquainted with the material facts as they truly existed. Not having done so, it was a *suppressio veri*; and whether made designedly or not, is equally fatal, and the confirmation, if obtained, will not avail him. The confirmation must not have been made in *pursuance* of the original transaction, or under the influence of that transaction, (*Wood v. Downes*, 18 *Vesey*, 125,) or under the same state of circumstances which produced that transaction. (*Crowe v. Ballard*, 1 *id.* 215.) A confirmation given under the idea that the original transaction was valid when it was not, will be set aside. (*Roche v. O'Brien*, 1 *Ball & Beat.* 333. *Gowland v. De Faria*, 17 *Vesey*, 18. *Dunbar v. Frederick*, 2 *Ball & Beat.* 317.)

It is very doubtful, I think, whether the confirmation or

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ratification of June, 1857, if made with all the conditions, and under all the circumstances required, was an act either of the corporation or of the stockholders. To make it binding on the former, there must have been, according to the charter, a quorum of the stockholders; and in corporations having stock, each share is deemed a stockholder, and a majority of shares present or represented is a majority of the stockholders. A very large proportion of stockholders represented at that meeting were there by attorney, and the power given only authorized them to vote for the election of directors. It did not authorize them to bind their principals to acts and in reference to matters not authorized or assumed by the power. The ratification or confirmation by such attorneys or agents, having no power to act in the premises, neither bound the corporation nor the stockholders for whom they thus, without any authority, assumed to act.

But even if the confirmation had been legally made, and by a majority of the stockholders, which it clearly was not, when, as in this case, it was to be made by a class, the sanction of a major part will not be obligatory on the rest; but the confirmation, to be complete, must be the joint act of the whole body. (*Ex parte Hughes*, 6 Vesey, 622. *Ex parte Lacey*, *Id.* 628. *Ex parte James*, 8 *id.* 337. *Davoue v. Fanning*, 2 John. Ch. R. 264.)

At the meeting of June, 1857, certain stipulations of the transportation contracts were relinquished by the defendant Sherman, and it is contended that the acceptance of this release bound the corporation and the stockholders to the contracts, and operated as a ratification of the same. What would have been its effect had the defendant Sherman stood in the attitude of a stranger to the plaintiffs and the stockholders, it is not necessary to determine. But in view of their actual relations, and in accordance with the principles above stated, as applicable to confirmations in such cases, it can have no binding effect. Sherman, in his affidavit, speaks of the release proposed to be given, as "his concession or consent to

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modify" the original transaction. He also says, that when Grosvenor, one of the stockholders, questioned the transaction, he (Grosvenor) admitted that the plaintiffs "had no claim on said Sherman and Dean to change or modify said agreement. \* \* \* And thereupon Sherman consented to make said modification." Mehaffey swears that "he did not contemplate" the subject coming up at the stockholders' meeting in June, 1857; that, "on the contrary, he regarded it as having been definitely settled, approved of, and ratified by the stockholders;" that it was brought up by Grosvenor; "that said Grosvenor observed that whilst the stockholders had no claim, and could not claim it as a right, that Sherman and Dean should modify said contract," &c. Riley, a stockholder, who attended the meeting in June, 1857, says that he was not aware, nor does he believe any of the stockholders were aware, of their legal rights, or that they had any claim to have the deed and contracts, to use his own expression, "ripped up;" that no resolution was passed or offered at said meeting approving said contracts and sale.

It is very apparent that no actual ratification or confirmation took place, and I am unable to see that any thing was done which would authorize one to be implied. Even if obtained, Sherman was dealing with his *cestuis que trust*, and standing on the original transaction, claiming its validity and binding character; and his *cestuis que trust* believing it so to be, he is debarred, on the authority of the cases already cited, from claiming any benefits from such confirmation, even if it had been made as distinctly and unequivocally as he pretends.

After a most patient investigation of the facts in this case, and the numerous authorities cited in the protracted and very able arguments made by the learned counsel for the respective parties in this cause, I have arrived at the conclusion, entirely clear to my own mind, that this deed of sale and contract cannot be sustained. To hold otherwise, would be to overturn principles of equity which have been regarded as well settled since the days of Lord Keeper Bridgman, in the 22d

of Charles second, to the present time—principles enunciated and enforced by Hardwicke, Thurlow, Loughborough, Eldon, Cranworth, Story and Kent, and which the highest courts in our country have declared to be founded on immutable truth and justice, and to stand upon our great moral obligation to refrain from placing ourselves in relations which excite a conflict between self interest and integrity.

I have arrived at this result without considering the question of fraud raised in the complaint, and denied by the answering affidavits. I have chosen to place my decision on higher and more satisfactory grounds. I adopt the language of Lord Eldon in *Ex parte James*, (8 *Vesey*, 345 :) "It rests upon this, that the purchase is not permitted in any case, however honest the circumstances, the general interests of justice requiring it to be destroyed in every instance, as no court is equal to the examination and ascertainment of the truth, in much the greater number of cases." There may be fraud, as Lord Hardwicke observed, and the party not be able to prove it. To quote Chancellor Kent: "It is to guard against this uncertainty and *hazard* of abuse, and to remove the trustee from temptation, that the rule does and will permit the *cestui que trust* to come at *his own option*, and, without showing any actual injury, insist upon the experiment of a resale. This is a remedy which goes deep and touches the very root of the evil. It is one which appears to me from the cases which have been already cited, and from those which are to follow, to be most conclusively established." The trustee purchased with this clog upon his title, and with a knowledge that his *cestui que trust* might, at his option, in the absence of all fraud, apply within any reasonable time to have the sale vacated.

For the reasons herein stated, I have no doubt such are the rights of the present *cestuis que trust*, the plaintiffs in this suit, and they having established a *prima facie* right to have the deed and contracts canceled, and the lands sold reconveyed to them, it is my duty to restrain the defendants until the

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hearing of this cause, as asked for in the complaint and supplemental complaint.

The plaintiffs have the right to their real estate, or any thing into which it has been transmuted. It is therefore proper to restrain the defendants from transferring the stock owned by them in the Hoffman Coal Company, which but represents the real estate of the plaintiffs, and the privileges and advantages secured by the transportation contract.

The motion for an injunction is therefore granted.

[NEW YORK SPECIAL TERM, January 31, 1859. *Davies*, Justice.]

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HUNTLEY, Receiver &c. of the Cattaraugus County Mutual Insurance Company, *vs.* BEECHER.

The charter of a mutual insurance company provided that when any property insured by the company should be alienated, the policy should thereupon be void, and be surrendered to the directors, to be canceled; and that upon such surrender the assured should be entitled to receive his deposit note, upon the payment of his proportion of all losses and expenses that had occurred previously. The by-laws contained a provision that whenever a party insured should mortgage the property, his policy should be void, unless he should give notice thereof to the company. At an annual meeting of the members of the company, it was resolved that when an insured had alienated his property before loss sustained, his premium note should not be assessed, although he had not surrendered his policy.

*Held* that, independent of the resolution, passed by the company, a person insured who had alienated the insured property by mortgage and deed, without giving notice to the company of such alienation, or surrendering his policy, remained liable, upon his premium note, for losses occurring subsequent to the alienation. But that by the resolution the company waived a compliance by its members with the provisions of the charter relating to a surrender of the policy, &c., and in effect declared that it would dispense with the formality of a surrender, when there were no losses to be paid, and the assured had aliened the insured property; and that it would itself take notice of the alienation, and would make no assessment upon the premium note, to pay future losses.

Accordingly *held*, that the receiver of the company could not maintain an action

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to recover an assessment upon a premium note thus situated, made for the purpose of paying losses occurring since the alienation of the property.

*Held, also*, that the resolution was not void, as being in conflict with the provision contained in the charter of the company.

The fact that the charter of an insurance company expires, by its own limitation, within the period during which a policy is by its terms to continue, will not avoid the policy, and discharge the insured from his liability upon his premium note. The policy is valid for the unexpired term of the charter. Nor will the insured be entitled to any rebate, or deduction, from the amount of an assessment, or from the amount of the premium note, on account of the fact that the charter of the company was to expire, and did expire, prior to the expiration of the period during which the policy, by its terms, was to continue.

CASE agreed upon, without action, pursuant to section 372 of the code. The Cattaraugus County Mutual Insurance Company was incorporated in March, 1837. By the terms of the act it was to take effect immediately, and to continue in force for the term of twenty years. In June, 1837, a set of by-laws was adopted, in which was contained a provision, that "Whenever any one, hereafter insured, shall alienate conditionally by mortgage, his policy shall be void, unless he shall make a representation thereof, in writing, to the directors, stating the amount and to whom mortgaged, who shall have the power to assent to said mortgage or to cancel said policy." At an annual meeting of the members of the company, held in June, 1843, it was "Resolved, that when an insured has alienated his property insured before any loss has been sustained, his premium note shall not be assessed, although he has not surrendered his policy." This resolution was recorded in the book of minutes of the proceedings of the company kept by its clerk. The defendant, January 5, 1853, was the owner in fee of a house and lot and barn and lot in Ellicottville; and on that day he made application to the company in proper form for an insurance of the house and barn, and on the 8th day of January, 1853, the company issued to him a policy of insurance upon the house and barn, for five years. He, at the same time, gave the company his note for \$165, in consideration of the policy, by which he promised

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to pay the sum named, "in such portion and at such time or times as the directors of said company may, agreeably to their charter and by-laws, require." On the 1st day of July, 1854, Beecher mortgaged the house and lot and barn and lot to one Aiken, in fee, to secure the payment of \$500. The company never assented to the mortgage, nor was the company notified of the fact of its execution or existence. On the 10th day of September, 1855, Beecher sold and conveyed by a deed in fee simple, with warranty, the house and barn and lots to Eleazer Harman. No notice of this sale and conveyance was ever given to the company or its directors, and there was never any ratification of, or assent to, the sale and conveyance, by the company. Nor was the policy confirmed to Harman. At that time there was no assessment due on the note given by Beecher. The policy, by its terms, was to continue and remain in full force for and during the term of five years from its date, Jan. 8, 1853. The premium note was given for the amount usually charged on five year policies, for the class of risks in which the house and barn were classed. And at that time Beecher supposed, and labored under the mistaken impression and belief, that the five years specified in the policy for its continuance would expire prior to the expiration of the twenty years specified in the act of incorporation for the continuance of the act. He supposed and believed he was getting a good policy for five years. The note given by Beecher had been assessed for losses, in April, 1856, and January, 1857, by the receiver, at the rate of twenty three cents and forty-four one hundredths of a cent on the dollar; making no allowance for the fact that the charter of the company would and did expire within five years of the date of the policy. The amount assessed was \$38.68. Beecher refused to pay any part of the amount so assessed.

The questions propounded in the case were, (1.) Did the execution of the mortgage from Beecher to Aiken work a forfeiture of the policy, and discharge Beecher from his liability, on said premium note, for the losses accruing to the company

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in April, 1856, and January, 1857? (2.) Did the alienation by Beecher to Harman of the property insured have that effect? (3.) Does the fact that the charter of the company would and did expire by its own limitation, within the five years during which the policy was by its terms to continue, avoid the policy, and discharge Beecher from all and every liability on or by virtue of the premium note? (4.) Is Beecher entitled to any rebate or deduction from the amount of the assessment, or from the amount of the premium note, on account of the fact that the charter would and did expire prior to the expiration of the period during which said policy was by its terms to continue?

*A. G. Rice*, for the plaintiff, cited *Neely v. Onondaga Mutual Ins. Co.*, (7 Hill, 49,) and *Hyde v. Lynde*, (4 Comst. 387.)

*Bolles & Crosby*, for the defendant.

*By the Court*, MARVIN, J. It is provided in the charter that "when any property insured with this corporation shall be alienated by sale or otherwise, the policy shall thereupon be void, and be surrendered to the directors of the said company to be canceled, and upon such surrender, the assured shall be entitled to receive his deposit note, upon the payment of his proportion of all losses and expenses that have accrued prior to such surrender." In *Smith v. The Saratoga Mutual Fire Insurance Company*, (3 Hill, 508,) by the terms of the policy it was to become void if it was assigned without the consent of the company in writing. The policy was assigned and a loss happened, and it was held that the policy was void and no action would lie upon it. In *Neely v. The Onondaga County Mutual Ins. Co.*, (7 Hill, 49,) the charter of the defendant contained the same provisions above quoted. The action was upon the policy. The assured had aliened and sold the insured property prior to the loss, and the company, with notice of such alienation, assessed his premium

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note for losses that had accrued after the alienation, and collected such assessment. The court held that there could be no recovery; that when the loss happened, the policy was a mere nullity. It was also held that although the policy became void by the alienation of the property insured; it did not follow that the deposit note was also void; that until the assured surrendered his policy and paid his proportion of all losses which accrued prior to such surrender, the deposit note remained obligatory upon him. In *Hyde, receiver, v. Lynde*, (4 Comst. 387,) the charter of the Chenango Mutual Insurance Company contained the same provisions as above cited. The assured had aliened the insured property, and had surrendered his policy, which had been accepted by the company, and the note was canceled and surrendered. It was held that he was no longer liable upon his note, for losses, though they happened prior to the surrender of the policy, &c., in the absence of all fraud.

The opinion in the case in 7 *Hill* is in point, showing that though the policy is avoided by the alienation, the assured remains liable upon his note, for losses, after the alienation, until he surrenders the policy to be canceled, when he is entitled to his deposit note, upon the payment of all losses and expenses that have accrued prior to the surrender. According to this case, Beecher remained liable upon his note, for losses accruing subsequent to the alienation by mortgage to Aiken, and by deed to Harman; unless the resolution adopted at the annual meeting of the members of the company, held June 16th, 1843, affects the question.

By that resolution it was declared "That when an insured has aliened his property insured, before any loss has been sustained, his premium note shall not be assessed, although he has not surrendered his policy." The case does not show that any loss had been sustained when Beecher aliened the property insured. The assessment made by the receiver is for losses accruing after the alienation. Beecher therefore comes within the very terms of the resolution, and by that the com-

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pany declared that it would not assess his premium note, although he should not surrender his policy. The company, in effect, declared that it would dispense with the formality of a surrender of the policy, when there had been no losses to be paid, and the assured had aliened the insured property. That it would, itself, take notice of the alienation, and would make no assessment upon the deposit note, for future losses.

It seems to me that the company was bound by this resolution, and that it thereby waived a compliance, by any and all of its members coming within the terms of the resolution, with the provisions of the charter relating to a surrender of the policy, &c. The counsel for the receiver takes the position that the resolution is in direct conflict with the statute, and that it is therefore void; and cites *Hyde v. Lynde*, (4 Comst. 387.) We have seen what that case was. I am unable to extract from it any thing in point to sustain the position of the counsel. In that case the policy was surrendered, and the note was canceled and surrendered to the assured; and the court held that, in the absence of fraud, no recovery could be had against the assured to contribute to losses which had then accrued and were unsettled. It seems to me that this case is rather authority to show that the company had power to dispense with a strict compliance with the provisions of the act. The decision was put upon the ground that whether losses, &c. &c. had accrued, &c., were matters to be adjusted between the party surrendering the policy and the company, before the note should be given up; and that when they came to an agreement, and the policy and the note were surrendered, the individual ceased to be a member of the company, and all right to make assessments or calls upon him or upon the note, was at an end. The case is not in point to show that the resolution in this case was void. Upon general principles, I see no objection to the resolution. By the charter the assured had a right to surrender the policy and to demand his deposit note, upon paying his proportion of any losses, &c. If no losses or expenses had accrued, he had a right to

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demand his note without paying any thing. If the members composing the company see fit to say that in case any one of them shall alien his insured property, no assessment shall be made upon his premium note for any subsequent losses, though he does not surrender his void policy, who is injured thereby? After adopting such a resolution, saying, in effect, to a member, you need not surrender your policy to be canceled, your note shall not be assessed, it would be a fraud to assess the note and attempt to collect the assessment; and the company should be estopped by its own declarations from doing so.

In my opinion the plaintiff, as receiver, has no claim in this case upon the defendant: Though the charter of the company was to expire by its own limits nearly a year before the expiration of the five years mentioned in the policy, I think the contract between the parties was not void. The policy was valid for the unexpired term of the charter. It is stated in the case that Beecher, at the time he executed the note and accepted the policy, supposed, and labored under the mistaken belief, that the five years specified in the policy for its continuance, would expire prior to the expiration of the charter, and that he was getting a good insurance for five years. These facts will not change the rights of the parties. There is no question of fraud in the case. The legal presumption is, that Beecher knew what the law was, and that he contracted with reference to the law as it actually existed. This presumption is conclusive upon the parties, and they cannot be heard to allege to the contrary. (1 *Story's Eq.* § 111 to § 139. *Broom's Legal Maxims*, 190. *Maxim* "Ignorantia juris non excusat." 8 *Pet. R.* 287.)

The corporation could not extend its existence by entering into contracts to be performed after the expiration of its charter. (*Mumma v. The Potomac Company*, 8 *Pet. R.* 287.) Upon the dissolution or civil death of a corporation, at common law, all its real estate unsold reverts back to the original grantor or his heirs; the debts due to and from the corporation are extinguished, and all the personal estate of the cor-

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poration vests in the people. (*Grant on Corp.* 303, 304. 2 *Kent's Com.* 307. *Angel & Ames on Corp.* 128, 667.)

In this state, these consequences are guarded against by statute. (1 *R. S.* 600, § 9.) And upon the dissolution of the corporation, unless other persons shall be appointed, the directors or managers of the affairs of the corporation at the time of its dissolution, become trustees of the stockholders; and they have power to settle the affairs of the corporation, collect and pay the outstanding debts, and divide among the stockholders the moneys and other property that shall remain after the payment of debts and necessary expenses.

Any one contracting with a corporation, contracts with reference to the powers of the corporation, and the laws of the state applicable to it. (*Angel & Ames on Corp.* 129.) A dissolved corporation may be received, or the charter may be extended by a legislative act. When its existence is continued by the revival of its charter, it retains its property, and remains liable upon its obligations. (*Id.* 668. *Grant on Corp.* 304.) Had the Cattaraugus County Mutual Insurance Company not become insolvent, and the legislature had renewed its charter for another period of twenty years, would not the policy issued to the defendant Beecher have been good for the whole five years? No reason occurs to me why it would not have been valid. If so, this is another reason why the contract between him and the corporation should not be held void *ab initio*, as the parties may have contemplated that the charter would be renewed. But aside from this suggestion, I am satisfied that the policy was good and valid for the time the company by its charter was to exist.

I am also of the opinion, that Beecher was not entitled to any "rebate or deduction" from the amount of the assessment, or from the amount of the premium note, on account of the fact that the charter was to expire, and did expire, prior to the expiration of the period during which the policy by its terms was to continue.

If, in fact, the company did make a difference in the amount

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of the premium note, depending upon the time the policy was to continue, it may be that some injustice was done to Beecher. The case however does not show such fact; and if it did, in my opinion no abatement could be had when an assessment for losses should be made. The answer to such a position would be the contract made under the charter. By it the directors had authority to determine the rates of insurance, the sum to be insured, and the sum to be deposited for any insurance, and the assured was to deposit his note for such sum as the directors should determine, and immediately pay a part of it not exceeding five per cent. The sum to be paid for losses by such member, was to be in proportion to the *original amount* of the deposit note. (*Sections 5, 6 and 10 of the Charter.*) There was no authority for making any rebate or deductions.

There must be a judgment in favor of the defendant Beecher for costs.

[ERIE GENERAL TERM, November 22, 1859. *Greene, Marvin and Davis*, Justices.]

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THE PEOPLE, *ex rel.* Moses M. Smith, *vs.* DEODATE PEASE.

The action in the nature of *quo warranto*, under the code, although differing in some of the formula of procedure, from proceedings by information or by writ of *quo warranto*, is nevertheless, in substance, the same, and is governed by all the rules which regulated the proceedings under the former practice. Boards of inspectors of elections are not judges, nor do they exercise a judicial power, in receiving and counting the votes and declaring the result. PRATT, P. J. and MULLIN, J. dissented.

It is competent for the legislature to make the inspectors of elections the sole and final judges of the qualifications of persons offering to vote. But it has not done so. The elector is made the judge of his own qualifications, and his conscience takes the place of the judgment and decision of every other tribunal, for that occasion. They may instruct and advise him, but they cannot decide upon his qualifications.

The statute prescribes in what case the inspectors may reject a vote, *viz.* upon

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the refusal of the party to take the oaths; and they can reject in no other case. *Expressio unius est exclusio alterius.*

The inspectors act ministerially, in determining whether they will receive or reject the vote.

Hence the question of the qualification of a person offering to vote is, like other questions, open to litigation in the courts, when the right of the voter is directly in issue, either in an action against the board of inspectors, for rejecting the vote, or for knowingly permitting a person to vote who is not qualified; or, in a proceeding properly instituted, to determine the right to an office, or to punish the illegal voter. PRATT, P. J. and MULLIN, J. dissented.

Accordingly *held*, that in an action in the nature of a *quo warranto*, to try the title to an office, the defendant may give evidence tending to prove that a number of those who voted for the relator, and sufficient to change the result, were not properly qualified voters, or entitled to vote at the election. PRATT, P. J. and MULLIN, J. dissented.

The county courts of this state are courts of common law jurisdiction, and have jurisdiction in proceedings for the naturalization of aliens, under the act of congress. MULLIN, J., dissented.

THIS action, in the nature of a *quo warranto*, was brought to try the title to the office of county treasurer of the county of Lewis, and was tried before MULLIN, J. and a jury, and a verdict rendered for the defendant. At the election in November, 1857, the relator and the defendant were candidates of their respective parties for the office named. Of the votes cast, Moses M. Smith received 1683, Moses Smith 2, and M. M. Smith 17; Deodate Pease 1694, D Pease 3, and Deodate Beas 1. The inspectors of election rejected all the votes except those given for Moses M. Smith and Deodate Pease, and the county canvassers gave to the defendant a certificate of his election. Evidence was given upon the trial that the votes given for Moses Smith and for M. M. Smith were intended to be given for the relator, and which being allowed, gave him a majority over the defendant and entitled him to the office. The defendant then gave evidence, under objection and exception, tending to prove that a number of those who voted for the relator, and sufficient to change the result, were not properly qualified voters or entitled to vote at said election. Some of those so voting claimed to be naturalized citizens, having

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been naturalized since 1847 in the county court of Lewis county; and the judge at the circuit held and decided, under objection, that such naturalization was void, the county court having no jurisdiction in the premises. Evidence was also given by the defendant, under objection and exception, tending to show that the naturalization papers of several of the persons so voting for the relator were forgeries, in this, to wit, that the original declaration of intention to become citizens had been made less than two years before their admission as citizens, and that the date of such declaration of intention had been fraudulently altered so as to give the court apparent jurisdiction to admit them. It does not appear that any question was submitted to the jury on this evidence. One witness, a foreigner, whose naturalization was void within the ruling of the judge, and who voted at the election of 1847, was asked who he voted for; and the question was objected to by the relator, for several reasons, and the objection was overruled. The witness then claimed to be privileged from answering the question, and the judge disallowed the claim and directed him to answer, and he testified that he voted for the relator. On cross-examination, he testified that he could not tell of whom he got the ballot; that he did not read it; and the defendant was then permitted to prove by this and by several other witnesses, for the purpose of showing that they voted for the relator, that they acted with the democratic party, (by whom the relator was nominated,) and that the persons handing them tickets represented them to be democratic tickets. This was objected to by the relator and admitted as evidence. A motion for a new trial was made, on a bill of exceptions, by direction of the judge, given upon the coming in of the verdict,

*J. F. Starbuck*, for the plaintiff.

*T. Jenkins*, for the defendant.

W. F. ALLEN, J. *A quo warranto*, for which this action is a substitute, is in the nature of a writ of right, and lies in

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behalf of the king, against him who usurps or claims any franchises or liberties, to say by what authority he claims. (3 *Bl. Com.* 262.) By statute, writs of *quo warranto* and informations in the nature of *quo warranto* are abolished, and an action is given in the name of the people when any person shall usurp, intrude into, or unlawfully hold or exercise, any public office, civil or military, or any franchise within the state, or any office in a corporation created by the authority of the state. (*Code*, §§ 428, 432.) The action under the code, although differing in some of the formula of procedure from proceedings by information or by writ of *quo warranto*, is nevertheless in substance the same, and is governed by all the rules which regulated the proceedings under the former practice. The proceeding, both now and formerly was, and is, intended to try the right of the defendant to the office possessed by him. The right of the adverse claimant may also be established in the same proceeding. (2 *R. S.* 582, §§ 30, 31.) As the name of the writ, from which the action derives its name and takes its peculiar characteristics, indicates, it is a proceeding in which the defendant is called upon to show his warrant for exercising the duties of the office or other franchise which he claims; and unless he pleads that he did not use the office, or sets up some matter in avoidance of the writ, upon the trial of the action the *onus probandi* lies upon the defendant, who must prove his title to the office. (*Cole on Quo Warranto*, 221.) The mere right to the office is tried, and not the use under color of right, which would be sufficient, ordinarily, to establish the right of the incumbent when collaterally questioned, and the defendant must rely on the strength of his own title. The only valid title to an elective office rests upon the choice of the electors, expressed in the prescribed method. No person can claim to be chosen to an elective office who has not received the votes of a majority of those qualified to vote, and who have voted at the election. He who is called upon to make title to an office under an election must in some way prove this, or he will be ousted. He

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may prove it in the first instance by the proper declaration or certificate of those whose duty it is to preside at the election or to canvass the votes. But acts of the presiding officers, or the certificate of the canvassers, have never been held conclusive in a proceeding brought directly to overthrow them. The election gives the right to the office, not the return. An action in the nature of a *quo warranto* is the only method for reviewing the acts of the officers and boards charged with the execution of the election laws, and it follows that unless for some reason of public policy they are made conclusive, and by a rigid rule of law are made to preclude all inquiry, they may be impeached by any evidence which will satisfy the judicial mind that they are not true. In other words, they are but *prima facie* evidence in favor of the incumbent, and may be shown to have been given under a mistake, or to have been procured by fraud, and by parity of reasoning that the majority certified was made by the votes of those who were not qualified to vote, which would be only one way of showing that the claimant had not received a majority of the votes cast by the duly qualified electors. The very purpose of the writ fails if inquiry must stop any where short of the very truth and right of the case; and upon principle, there would seem to be no doubt that the proceeding necessarily opened up an inquiry into every fact which would tend to show who of the claimants, if either, was the choice of the electors. If the statute makes the action of the inspectors of election in receiving and counting the ballots, or of canvassers in estimating and certifying the result, conclusive, the court has but so to say, and there will be but little difficulty in disposing of actions of this nature. I can see many reasons why, with a view to the success and the permanence of our institutions in this, above all other countries, there should be the fullest and freest investigation in courts of justice, where facts can be properly investigated in regard to the validity and fairness of elections to public office; and I have been able to see no reasons of public policy which should exclude the people or any individ-

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ual interested, by the acts of the officers of election, or limit courts to a particular line of inquiry. It is conceded that inquiry may go behind the ballot box to ascertain the intent of the voter and with a view to give that intent effect, and yet to what good purpose if the vote chances to have been cast by a person not qualified, or if, being cast by a qualified voter, it may be balanced by an unqualified person into whose qualifications we may not inquire. Suppose upon this trial one of those who voted for M. M. Smith, after having testified that he intended the ballot for the relator, was proved to have been at the time a resident of New York city or an unnaturalized foreigner, would it be claimed that his ballot should be made good and counted for the relator by reason of his intention? I think not. The pains and penalties denounced by law against illegal voting and frauds upon the elective franchise have but little terror for those against whom they are aimed; but if those who seek to profit by these frauds find that they really gain nothing by them, and that offices obtained by such means are held by a frail tenure, it will remove the temptation to fraud. There is no tribunal by which frauds upon the ballot box can be investigated, except the judicial tribunals of the state, and there only in a way to redress the wrong upon the trial of the right of office in an action instituted for that purpose. It is urged that the action of the inspectors of election in receiving the ballots of those offering to vote is judicial, and their determination conclusive, as the judgment of a competent tribunal upon the qualifications of the voter. If it were true that the inspectors were judges, in this sense, I should hesitate to admit the conclusion that in this proceeding their acts and decisions which substantially affected the result could not be reviewed. It must be borne in mind that their decisions cannot be reviewed by writ of certiorari, nor in any other way except by *quo warranto*, and that such proceeding is designed solely to review the acts of the election boards, directly, and give such judgment as they should have given or might have given if they could have investigated the matter

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and arrived at the truth. But when the courts held, as they have held in several cases, that they may upon extrinsic evidence reverse the acts and decisions of the board of inspectors, by allowing votes to the claimant which the inspectors had decided were not for him, and had disallowed, all idea of a judgment *conclusive* for any purpose in a proceeding brought directly to overthrow it, is gone. But I find no authority for holding that the board of inspectors are judges, or exercise a judicial power in receiving and counting the votes and declaring the result. It is true they are called upon to exercise their judgment, as every other public officer is. A county clerk acts ministerially when he records a deed, but he exercises his judgment in passing upon the genuineness of the certificate of the proof of acknowledgment of execution, its sufficiency in form, and the authority of the officer to take it. In *Ashby v. White*, (2 *Ld. Raym.* 938,) which was an action against returning officers at an election for members of parliament, for refusing to admit the vote of the plaintiff, Gould, J. was of the opinion that the defendants were judges at the election, and therefore the action would not lie; Powys, J. thought they were not judges, but quasi judges, and were not liable to an action. Powell, J. said, "I do not agree with my brothers upon their first reason that the defendant is a judge. I do not understand what my brother Powys means by saying he is quasi a judge; seeing he must be a judge, or no judge;" but for other reasons he thought the action would not lie. Holt, chief justice, said, "but my brother Powell is of opinion that the defendant neither is a judge nor any thing like a judge, and that is true;" and he was of opinion that the action would lie for a willful rejection of the vote of an elector, and his opinion was sustained by the house of lords, reversing the judgment given by a majority of the judges. In a like case in our own court, following *Ashby v. White*, it was held that officers required by law to exercise their judgments were not answerable for mistakes in law, or mere errors of judgment, without fraud or malice. But inspectors of election were not distinguished from any

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other officers who are not judges, or "any thing like judges." (*Jenkins v. Waldron*, 11 *John*. 114.) For a strictly judicial act no action will lie. (*Moor v. Ames*, 3 *Caines*, 170.) The duty may be so far judicial in its nature as to protect the officer from liability for error of judgment, and yet not give his acts the character of a judgment and conclude all inquiry into their correctness when brought directly in question. (*Wilson v. Mayor of New York*, 1 *Denio*, 595.) In some matters inferior tribunals are made judges, and their decision is final, in matters within their jurisdiction. (*Wood v. Peake*, 8 *John*. 69. *Van Wormer v. Albany*, 15 *Wend*. 262.) It was competent for the legislature to make the inspectors of election the sole and final judges of the qualifications of persons offering to vote. But if they have not, then like other questions it is open to litigation in the courts when the right of the voter is directly in issue, either in an action against the board, for rejecting the vote, or for knowingly permitting a person to vote who is not qualified; or, in a proceeding properly instituted, to determine the right to an office or to punish the illegal voter. The qualifications of voters are prescribed by the constitution, article 2, and the laws enacted in pursuance of it, and an election to office by persons assuming to vote who are not thus qualified is no election at all. It is very evident that neither the inspectors of election nor the canvassers, either state or county, have the means of investigating and determining the qualifications of voters. They cannot summon witnesses, or empanel a jury, or give the parties interested a hearing. They can examine the proposed elector upon his oath, and there their power and means of judicial investigation cease, and it would be strange indeed if their conclusions should be final as against the state and all interested. The returns of election inspectors are deemed ministerial and not judicial acts, and hence they have been scrutinized with great freedom in proceedings by mandamus, informations in the nature of a *quo warranto*, &c. (*Ex parte Heath*, 3 *Hill*, 42.) Their acts in receiving the ballots offered are no less ministerial than in

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making their returns. "On a given concurrence of circumstances well defined by constitution or statute, they are bound to receive and count votes and give certificates of election. They have no more discretion than a sheriff in disposing of real estate upon execution. They may have judicial powers conferred upon them, and then their certificate becomes conclusive." (*Per Cowen, J., in People v. Bristol and Rensselaerville Turnpike Co.*, 23 *Wend.* 228.) In South Carolina, in cases of contested elections, the managers of the election have authority to hear and determine the contest, and in such case their decision is final. (*The State v. Delieesseline*, 1 *McCord*, 52.) The statute in this state vests no discretion with the inspectors of election, whether to receive or reject the vote offered, if the party offering the vote submits to take the oath prescribed by law. It is true they may, at their peril, reject a vote, and proof that the person offering it was not an elector entitled to vote will be a justification; and if they knowingly and willfully permit a person to vote who is not entitled to vote, they shall be adjudged guilty of a misdemeanor. (*Laws of 1847, ch. 240, § 16.*) The act regulating elections prescribes two oaths to be administered to any person offering to vote, whose right to vote is challenged. If a person refuse to take either, his vote shall be rejected. The first is preliminary, and is to answer such questions as shall be put to him. If from his answers the inspectors deem him not qualified to vote, they shall point out to him in what respect he is deficient in qualifications, and then if he persists in his claim to vote, the general oath is to be tendered to him; and if he refuse to take it, his vote shall be rejected; but if he takes the oath prescribed, the inspectors must receive his vote. (2 *R. S.* 430, § 18 *et seq.* 5th ed.) The elector is made the judge of his own qualifications, and his conscience takes the place of the judgment and decision of every other tribunal, for that occasion. The inspectors may probe his conscience and instruct and advise, but they cannot decide upon his qualifications. The statute prescribes in what case they may reject a vote; they can re-

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ject in no other case. *Expressio unius est exclusio alterius*. The rejection is upon the refusal of the party to take the oaths, and the inspectors act ministerially, whether they receive or reject the vote. If any part of the duties of inspectors are judicial, it is in determining whether or not by a given ballot a certain candidate is indicated, and yet courts have gone behind their acts, and "behind the ballot box," as it is expressed, and decided upon the intent of the elector as manifested by his ballot. And this is the extent to which our courts have been called upon to go, hitherto. But in principle, it involves an inquiry into every proceeding and every act which can influence the result. In England the rule is established that upon an issue as to the right of an individual to an elective office, in answer to the *prima facie* case made by showing the result as declared by the presiding officers at the election, it may be shown that some of the votes counted for the incumbent were fraudulent, and that some of the voters were not qualified. (*Reg. v. Ledyard*, 8 A. & E. 535. *Reg. v. Quayle*, 11 id. 508.) And in *Inhabitants, &c. of Sudbury v. Stearns*, (21 Pick. 148,) which was an action of trover for the records of the parish, in which the right of the defendant to the office of clerk, and the consequent right to the possession of the books was contested, the court inquired into the qualifications of the voters, with a view to determine whether he received a majority of the votes cast by the qualified electors who voted at the election. But little aid can be derived from the random and casual remarks of judges, able and learned though they be, which might seem to bear upon the question more or less remotely, when the remark has not been necessary to the decision of the case in hand. It would not therefore be profitable to quote at length the incidental remarks of judges in cases not involving the right to go behind the act of the inspectors in admitting a vote, although the right does not seem to have been any where questioned by any one, but rather conceded. In *The People v. Seaman*, (5 Denio, 409,) the court went behind the determination of the inspectors,

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and also the decision of justices of the peace, that there was a vacancy, which could not be questioned collaterally, (*Wood v. Peake, supra; Wildy v. Washburn*, 16 *John. R.* 49,) and decided that a ballot which had been rejected was intended for one of the candidates, which being allowed him, gave him the office, displacing the officer that had been appointed by the justices upon the ground that there had been no election. Whittlesey, J. says: "We can look behind the certificate to see whether the canvass of the presiding officers was correct: whether they allowed the proper votes," &c.; that is, allowed votes in proper form deposited by qualified voters, for none other are "*proper votes*." A vote deposited by a party falsely personating an elector, is not a proper vote. Neither is a vote given by a minor a proper vote; and yet the claim is, that if they can be smuggled into the box, they become "*proper votes*," and no power exists any where to redress the wrong.

It is implied from *Ex parte Murphy*, (7 *Cow.* 153,) that improper votes will vitiate an election where, if rejected, the result would have been changed. Woodworth, J. in *The People v. Van Slyck* (4 *Cow.* 323,) says: "The acts of canvassers are ministerial, and the court will decide upon the right of a party to hold office, upon an examination of all the facts." Van Vechten, arguendo in that case, says: "The question is, whether the defendant was elected or canvassed into office. If the latter, he is not sheriff." There, as here, the struggle was to make the acts of the presiding officers at the election judicial, and conclude all parties. The estoppel was not allowed. The right to overhaul the legality of election proceedings by *quo warranto*, is expressly conceded by Bronson, J. in *People v. Jones*, (17 *Wend.* 81.) It was the question of the legality of the whole election, whether properly held or not, that he spoke of, as evil in its consequences. Speaking of proceedings by information in the nature of *quo warranto*, the same judge, in *The People v. Vail*, (20 *id.* 12,) says: "It reaches beyond these evidences of title, which are conclusive

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for every other purpose; inquires into and ascertains the abstract question of right." In *The People v. Cook*, (14 Barb. 259; S. C. 6 Seld. 67,) stress is laid on the opinions of the judges, especially in the court of appeals, that it is no where claimed or pretended that by reason of the irregularities complained of, legal votes had been rejected, or illegal votes received; clearly implying, that if such fact had been made to appear, the result might have been different, and that the qualifications of voters was the proper subject of inquiry with a view to determine upon the abstract right to an office. (See 4 Seld. 86, 91.) The judgment spoken of by the learned judge, in 14 Barb. 326, is the judgment of the electors—those qualified to vote, and who have voted—not of the presiding officers of the election, the mere registers of the will of the electors. The judge was right in permitting the defendant to give evidence of the qualifications of the persons whose votes, if allowed, would give the relator a majority. There is no such premium upon fraud, as would be held out by the impunity claimed for it, in the absence of all power in the courts to investigate it.

The principal objection to the right to vote of those whose qualifications were questioned upon the trial, was that they were foreigners, and had been naturalized in the county court of Lewis county, and not otherwise; and it was ruled by the judge at the circuit that the county courts of the state had no common law jurisdiction, and that therefore the proceeding was void and conferred no rights of citizenship upon the individual. It is proper to remark that we are not embarrassed by *The People v. Sweetman*, (3 Park. Cr. R. 358,) for the reason that the question was purposely left undecided. The opinion of Judge Pratt, as reported, was read and adopted, and the questions involved here were not considered. In the opinion written by me, not reported, I stated my impression, but it was a mere impression, and the question was not considered or examined with any care. There were so many

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other questions in that case, fatal to the conviction, that it was not necessary to pass upon doubtful ones.

The question now before us was expressly left an open question. By the act of congress of 1802, (2 *U. S. Stat. at Large*, 153,) every court of record in any individual state having common law jurisdiction and a seal and clerk, or prothonotary, has jurisdiction to admit aliens to the rights of citizenship. The county court, as a court of civil jurisdiction, succeeds to the old court of common pleas, which was coeval with the earliest judicature of the colony of New York. It was first established with jurisdiction "to hear, try, and finally to determine all actions, or causes of action, and all matters and things, and causes triable at common law of what nature or kind soever." (2 *R. L. App. No. 5*.) From that period to the adoption of the constitution of 1846, they continued to exercise substantially the same powers with which they were originally invested, with such modifications only as were rendered necessary by the constitutions of 1777 and 1821. These instruments do not prescribe the nature or extent of the jurisdiction of the court of common pleas, but left it for the legislature to regulate. The courts were reorganized by the revised statutes, which provided that there should be a court of common pleas in each county of the state, which should possess the powers, and exercise the jurisdiction, which belonged to the courts of common pleas of the several counties in the colony of New York, with the additions, limitations and exceptions created and imposed by the constitution and laws of the state. (2 *R. S.* 208, § 1.) It was left and remained a court of common law, with original jurisdiction, up to the time when the constitution of 1846 became the fundamental law of the state. Its name was borrowed from a court in existence in England which had general civil jurisdiction in causes between subject and subject. (1 *Bl. Com.* 23 ; 3d ed. 40.) The constitution of 1846, by implication, changes the name of the court from "common pleas" to "county court;" but it can hardly be inferred that it was intended to make a corres-

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ponding change in their jurisdiction in reference to a court of the same name in England. The county court there is held by the sheriff, is limited in its jurisdiction to pleas of debt or damages under the value of forty shillings, and is not a court of record. (1 *Bl. Com.* 178; 3 *id.* 35.) The county court of the constitution of 1846 is a court of record, and is not limited to the trial of small causes. The name was chosen with reference to its local and territorial jurisdiction, and not to indicate the character of its jurisdiction within its territorial limits. The constitution of 1846 declares that the county court shall have such jurisdiction in cases arising in justices' courts, and in special cases, as the legislature may prescribe; but shall have no original civil jurisdiction except in such special cases. (*Const. art. 5, § 14.*) The constitution only limits the power of the legislature in conferring original civil jurisdiction on the court, and does not prescribe the character or extent of jurisdiction other than original, which it may, under the legislative sanction, exercise. What constitutes a "special case" within this clause of the constitution is in great doubt; eminent jurists differing as to its true interpretation, and the court of appeals being as yet unable to fix upon a classification or definition by which the "special cases" may be distinguished from ordinary actions, cognizance of which the court cannot take. It was for a time supposed that the legislature could authorize it to take jurisdiction over ordinary common law actions, under circumstances prescribed by it. (*Beecher v. Allen*, 5 *Barb.* 169.) It was finally decided that an action for assault and battery was not a "special case," although the parties resided in the county and the damage claimed did not exceed 500 dollars; and the reporter says, in his head note to *Kundolf v. Thalheimer*, (2 *Kernan*, 593,) "It seems that the county court has not jurisdiction in any of the ordinary common law actions." It has now been decided that those courts have jurisdiction in cases of partition, and in actions to foreclose mortgages. (*Arnold v. Rees*, 18 *N. Y. Rep.* 57. *Doubleday v. Heath*, 16 *id.* 80.) Judge Com-

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stock, in *Arnold v. Rees*, says, "It would seem impossible, therefore, to hold that the constitution, in providing for jurisdiction in special cases to be prescribed by the legislature, has excluded all the remedies which were pursued by actions at common law," which is adverse to the reporter's *semble* in *Kundolf v. Thalheimer*. The uncertainty and doubt which has rested upon the power of the legislature to give the county court jurisdiction has greatly obstructed the usefulness of the court, and they can only be removed by adjudication of the court of appeals, as cases arise from time to time. But it is concerning original jurisdiction only that there is any doubt. There is no restriction upon the legislature as to any other jurisdiction. By the constitution, article 14, § 5, suits pending in the common pleas, and regularly commenced in justices' courts, were required to be transferred to the county courts provided for in that constitution. And by the judiciary act of 1847, all proceedings in such suits were transferred to, and vested in, the proper county court. (*Laws of 1847, p. 329, § 35.*) Then, as now, in any action commenced before a justice of the peace, the defendant might interpose the plea that the title to lands would come in question, and upon doing so, and giving the bond prescribed by statute, an action for the same cause might be commenced in the court of common pleas. (2 *R. S.* 236, §§ 59 *et seq.*) A justice of the peace had no jurisdiction other than of common law actions. It was exclusively "a common law jurisdiction." The same actions when continued in the court of common pleas were common law actions, and the court taking cognizance of them exercised "common law jurisdiction." Such actions were among those originally commenced in a justice's court, and by the very terms of the constitution were transferred to, and the jurisdiction therein vested in, the county court, which of itself, and without further legislation, brought the court within the requirements of the act of congress as a court "having common law jurisdiction." (*Brown v. Brown, 2 Seld. 106.*)

No legislation can deprive the court of this characteristic

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until this provision of the constitution is abrogated. It is not necessary to show that a single cause is pending, which was thus transferred. The jurisdiction is there, whether it has occasion to exercise it or not. By the code, as amended in 1851, suits commenced in a justice's court were authorized to be continued in the county court, whenever it appeared by the answer of the defendant that the title to lands would come in question. (*Code of 1851, § 55, &c.*) This act was constitutional, and conferred jurisdiction upon the county court over common law actions thereafter to be brought. (*Cook v. Nellis, 18 N. Y. Rep. 126.*) This act continued in force until 1858; so that under this law the court actually exercised common law jurisdiction from 1851 to 1858 in this class of cases. So partition, and some of the other remedies which are confessedly within the jurisdiction of the county court, are known to the common law in which courts of law and equity had concurrent jurisdiction. (*4 Bouv. Inst. 232.*) A writ of partition lay at common law. (*2 Black. Com. 189.*) So the proceeding to admeasure dower was a common law proceeding, &c. Again, the county court has common law jurisdiction in the revision of all judgments given in justices' courts. The court of appeals is a court of general common law jurisdiction, and yet it has no original jurisdiction. The county court, as an appellate court, is in like manner a court "having common law jurisdiction." The police court of Lowell which was authorized to hear and determine all complaints and prosecutions in like manner as justices of the peace, and had jurisdiction of all civil suits and actions cognizable by a justice of the peace, and had a seal and a clerk, was held to have authority under the act of congress to naturalize aliens. (*Ex parte Gladhill, 8 Metc. 168.*) We are also cited to a decision of Judge McLean in *re M. Smith*, said to have been made in 1859 and to be published in 3d volume *Law Gazette*, p. 237, to the effect that the probate courts for the several counties in Ohio had jurisdiction in naturalization proceedings. For more than ten years the county courts of this state have as-

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sumed jurisdiction to admit aliens to naturalization, and thousands have been naturalized by them ; and to hold at this day that they had no jurisdiction would be fruitful of mischief, creating doubts and uncertainty as to civil and personal rights, endangering titles to property, and in many instances, perhaps, destroying inheritances and changing the course of descent.

If there is a doubt as to the jurisdiction we ought not to yield to it, except upon the clearest evidence that it is well founded. But I entertain no doubt, and am of the opinion that the county court is a court of common law jurisdiction and has jurisdiction in naturalization proceedings, under the act of congress.

The judge at the trial also suffered the party to attack the certificate of naturalization by evidence aliunde, and to show that it was procured by fraud ; that its recitals were false, and that the party was not entitled to be naturalized. The certificate was the legal evidence of the judgment of a court of competent jurisdiction collaterally in question in the action. It was final and conclusive. It imported absolute verity, and could not, if valid on its face, be thus impeached in this action. When alienage is in issue, the judgment of the court admitting the alien to become a citizen is conclusive evidence upon that point. (*Ritchie v. Putnam*, 13 *Wend.* 524.) A record of naturalization cannot be contradicted by extrinsic proof that no declaration of intention had in truth been made. (*Banks v. Walker*, 3 *Barb. Ch. Rep.* 438.) Like any other judgment, it is complete evidence of its own validity. (*Spratt v. Spratt*, 4 *Peters*, 393.) This erroneous ruling does not appear to have affected the result, but as an exception was taken to the admission of the evidence, it is proper to pass upon it with a view to govern any future trial of the action. There must be a new trial granted ; costs to abide the event.

BACON, J. concurred.

PRATT, P. J. was of the opinion that the qualifications of those who had voted at an election could not be inquired into

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upon the trial of a right to an office, in an action in the nature of a *quo warranto*; that the action of inspectors, in receiving the ballot, was conclusive; and concurred in the remaining propositions put forth in the opinion.

MULLIN, J. dissented.

New trial granted.

[ONONDAGA GENERAL TERM, January 8, 1860. Pratt, Bacon, W. F. Allen and Mullin, Justices.]

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LOONEY, Supervisor of the town of Lancaster, *vs.* HUGHES and BRIGGS.

The duty of a town collector to pay to the several officers named in his warrant the sums required to be paid to them respectively, within one week after the first day of February, is the duty which the collector and his sureties, by their bond, undertake shall be performed; and on the failure of the collector to execute that duty, the condition of the bond is broken, and the liability of the obligors at once attaches.

For the purpose of enforcing that liability as speedily as practicable, the legislature has provided, *for the public benefit*, a summary mode of proceeding against a collector in default, by the issuing of a warrant within twenty days by the county treasurer, against the property of such collector, directed to the sheriff.

But the issuing of such a warrant, and the return thereof unsatisfied, are not conditions precedent to the right of the supervisor of the town to maintain an action against the sureties, upon the official bond of the collector.

Nor will the omission of the county treasurer to issue his warrant within the time specified in the statute, discharge the sureties from their liability upon the bond. GERRYS, J. dissented.

The provisions of the statute, relative to the issuing of such warrant, by the county treasurer, being for the public benefit, and not for the benefit of the sureties, are merely *directory*, in respect to the time within which the warrant is to be issued.

**M**OTION on the part of the plaintiff for judgment upon a verdict taken subject to the opinion of the court. The action was tried at the Erie circuit, before Justice GRAY and a

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jury. It appeared on the trial, that in 1855 one Osborn Jewell was collector of the town of Lancaster, Erie county. That on the 30th day of November, 1855, he, together with the defendants as his sureties, executed to the supervisor of said town a bond bearing date the 27th day of November, 1855, in the penal sum of \$13,122.20, reciting that said Jewell had been duly chosen such collector, and conditioned that he should well and faithfully execute his duties as such collector, which bond was duly approved by the supervisor, and filed with the clerk of the county. That at the time of receiving and approving said bond, the supervisor delivered to said Jewell the assessment roll of the town of Lancaster with the warrant of the board of supervisors of the county, in due form of law attached thereto, directed to said Jewell as collector of said town, for the collection of the sum of \$6561.20, and requiring said collector to pay divers sums to the several town officers therein named, and to the treasurer of Erie county the sum of \$4860.40, on or before the first day of February, 1856.

That said Jewell failed to repay the amount required by said warrant, or to make returns for unpaid taxes. That the amount unpaid and unaccounted for by the said Jewell was \$2259.91. That on the 10th day of April, 1856, the treasurer of Erie county issued his warrant to the sheriff of said county, commanding him to levy that sum of the goods, chattels, lands and tenements of said Jewell, and to make return thereof within forty days. That said sheriff duly returned the warrant *nulla bona*, and certified that the same remained wholly uncollected, and thereupon the supervisor of said town was duly notified and this action brought. It was shown on the part of the defense, that by subsequent collections and returns of another collector, the deficiency was reduced to the sum of \$2118. That the county treasurer issued no other warrant than that above mentioned, and that Jewell had disappeared before the warrant was issued. That he was seen in the city of Buffalo on the 4th day of April, 1856, having

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then in his possession money in bank bills and checks to the amount of \$1200, and county orders to the amount of \$300. That about said 4th day of April he left the public house at which he was stopping in the morning, leaving some papers, amongst which were some county orders, two pocket books, his assessment roll and his overcoat, and has not since been seen or heard-of. That while he was collector, and up to the time of his disappearance, he was a householder in said town of Lancaster.

Upon these proofs, the defendants claimed that the neglect of the county treasurer to issue the warrant within the time prescribed by the statute, exonerated the sureties; and that on the defendants' proof, the legal presumption was that if the warrant had been issued within the prescribed time, the alleged deficiency would have been collected; and that in the absence of all proof to the contrary, it *prima facie* appeared that the loss was occasioned by said neglect of the county treasurer, and the sureties of Jewell were thereby exonerated.

The court directed a verdict for \$2118, subject to the opinion of the court at general term, upon a case to be made by the plaintiff.

*Johnson Parsons*, for the plaintiff.

*E. Thayer*, for the defendants.

DAVIS, J. The bond executed by the collector Jewell and the defendants, is in conformity to the requirements of the statute. (1 R. S. 346, § 19.) Its condition is, that *Jewell shall well and faithfully execute his duties as such collector*. These "*duties*" relate solely to the public, and not to the manner of executing his office in those respects in which it relates to or affects the rights or property of individuals. They are defined and declared by statute with great care and exactitude. "Every collector shall within one week after the time mentioned in his warrant for paying the moneys directed to be

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paid to the town officers of his town and to the county treasurer, *pay* to such town officers and county treasurer the sums required in such warrant to be paid to them respectively, first retaining the compensation to which he may be legally entitled." (1 *id.* 398, § 6.)

The statute directs, that the warrant "shall require all payments therein specified to be made by such collector on or before the first day of February then next ensuing;" (1 *id.* 396, § 37;) and such was the requirement of the warrant in this case. The duty *to pay* to the several officers named in his warrant the sums required to be paid to them respectively, *within one week* after the first day of February, is therefore *the duty* which the collector and his sureties by their bond undertake shall be performed. So far as relates to taxes, which "the collector shall not be able to collect," the statute provides a mode and the terms, upon compliance with which he may be "credited by the county treasurer with the amount thereof" (1 *id.* 399, § 10.) But failing to secure this credit, the liability of the collector and his sureties upon their bond is at once fixed and certain by his default.

This is the view of the statute and of the liabilities imposed on the collector and his sureties, taken by the court in *Muzzy v. Shattuck*, (1 *Denio*, 233.) "I cannot assent," says Mr. Justice Jewett in that case, "to the proposition, that the liability of the collector is limited by the common law rule applicable to the ordinary case of misfeasance or neglect in the discharge of the duties of office by a public officer.

The provisions of the statute seem to me to recognize the collector of taxes in the light of a debtor for the amount of the taxes directed to be collected, and to provide the manner in which that obligation is to be discharged." And again: "The statute imposes a definite liability on the collector and his sureties for the omission to collect and pay, and whether that omission is the result of misfeasance or neglect, unavoidable accident or felony committed by another, I do not think it furnishes any defense to the action." Onerous as this obli-

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gation on the part of the collector and his sureties may be, the legislature have thought that the exigencies of the case required it. The statute has rendered the duty thus simple and severe, and the defendants have obligated themselves by their bond that Jewell should *execute that duty*. On his failure to do so the condition of the bond was broken, and the liability of the obligors at once attached.

For the purpose of enforcing that liability as speedily as practicable, the legislature has provided, as I think, *for the public benefit*, a summary mode of proceeding against the collector. By section 13 of the statute above cited, (1 B. S. 400, § 13,) it is enacted that where the collector neglects or refuses to pay or account for the taxes as unpaid, as required by the preceding provisions, "the county treasurer shall, within twenty days after the time when such payments ought to have been made, issue a warrant under his hand and seal, directed to the sheriff of the county, commanding him to levy such sum as shall remain unpaid and unaccounted for by such collector, of the goods, chattels, lands and tenements of such collector, and to pay the same to the county treasurer, and return such warrant within forty days after the date thereof, which warrant the county treasurer shall immediately deliver to the sheriff of the county, but no such warrant shall be issued by the county treasurer for the collection of moneys payable to the town officers without proof, by the oath of such town officers, of the refusal or neglect of the collector to pay the same or account therefor as above provided."

The 14th section prescribes the duties of the sheriff and county treasurer upon the collection of the moneys, or some part thereof, under the warrant. The 15th section prescribes the duty of the sheriff as respects the return to be made to the warrant where the whole, or but part, and where nothing is collected; and enacts also that where none or but part is collected, "the county treasurer shall forthwith give notice to the supervisor of the town or ward of the amount due from such collector." And the 16th section provides, that "the

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supervisor shall forthwith cause the bond of such collector to be put in suit, and shall be entitled to recover thereon the sum due from such collector with costs of suit, and the moneys recovered shall be applied and paid by the supervisor in the same manner in which it was the duty of the collector to have applied and paid the same."

In the case before us the warrant was issued by the county treasurer, but not till after the expiration of more than twenty days after the time when the payment ought to have been made by the collector. It was returned by the sheriff within forty days from its date, wholly *uncollected*.

The first and principal point on the part of the defendants is, that the issuing of the warrant and its return in strict accordance with the provisions of the statute, were conditions precedent to the right to maintain the action against the sureties on the bond; or in other words, that the sureties' obligation, in connection with the provisions of the statute, is a guaranty of collection in case a particular course is pursued.

The language of the bond, it is to be remembered, is, that Jewell "*shall well and faithfully execute his duties as such collector.*" We have already seen what are the duties of the collector, upon the failure to perform which the breach occurs. Now it is only *upon this breach, and after it has occurred*, that the treasurer can issue any warrant at all. So the argument of the defendants must go the length of establishing the gross anomaly that the obligations of the principal and his sureties on this bond are distinct and different; that of the former, that he will collect and pay over or account for the taxes within one week after the first day of February; of the latter, that the sum he fails so to pay or account for shall be collectible of him, provided a warrant is issued against him within twenty days after his default, in the form prescribed by the statute, and is executed or returned by the sheriff within forty days from its date, in the manner also prescribed. It is impossible to interpolate the provisions of the statute in regard to the issuing of the warrant and its return, into the

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bond, as *conditions precedent*, without wholly changing its scope and character.

It is *now*, by its terms, an obligation for the performance of specific duties *by the collector*: it would then be no obligation for the performance of those duties, but that after his failure to perform them, the taxes should be collectible of him by warrant, if issued, executed and returned in the mode named in the statute. In short, that if the county treasurer and sheriff, on the failure of the collector to discharge his duties, performed the duties devolved on them by statute, and failed to collect the moneys in whole or in part, then the collector and his sureties should become liable on their bond. It is clear that such was not the intention of the legislature, but on the contrary, that the taxes should be regarded as a debt owing by the collector, to be paid or accounted for within a prescribed period, the liability to pay which, both as against him and his sureties, should be absolute if he made default in paying or accounting within that time. It is for *the debt, thus having become absolute, that the warrant may issue*; and the liability of both principal and sureties upon the bond remains unaffected by the warrant, except only so far as it may be reduced by its fruits. In my opinion, the position cannot be maintained that the issuing and return of the warrant are *conditions precedent* to the accruing of the *liability of the obligors on their bond*.

But it is said that they are conditions precedent to the right to maintain any action on the bond; that is to say, that the right of the supervisor to sue the bond is suspended until the warrant has been issued and returned, and that the right to sue is made dependent upon a strict compliance with the requirements of the statute in the issuing and return of the process.

I have grave doubts whether the right of the supervisor to sue is at all restricted or affected by these statutes. The bond is to him in his official character. His right to maintain an action on it upon its breach, independent of any statute ex-

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pressely conferring it, would be clear. (*Supervisor of Galway v. Stimson*, 4 *Hill*, 136, and cases there cited. 2 *R. S.* 473, § 92.) This right is not necessarily taken away, because another and not inconsistent remedy is given to another officer against one of the obligors. Both remedies might be pursued at the same time. (*Almy v. Harris*, 5 *John*. 175. 10 *id.* 388. *Scidmore v. Smith*, 13 *id.* 322.) The suit would be affected by the issuing and return of the warrant only so far as that the defendants would be entitled to have whatever sum should be collected on the process applied to their benefit in the action, and to have the action itself dismissed on proper terms, if the whole deficiency were thus collected. Nor does the 16th section of the statute, which commands the supervisor to cause the bond to be forthwith sued after he has been notified by the county treasurer of the amount due from the collector, and declares that he shall be entitled to recover thereon "the amount due from such collector with costs of suit," necessarily affect this question. It simply commands the performance of a duty which existed before. It is not necessary that the supervisor should look to this section for his *authority to sue*, if the object of the legislature was only by express mandate to enjoin the exercise of an existing authority.

But it does not seem to me necessary to determine this question, in order to the correct disposition of this case. It may be conceded that the authority of the supervisor to sue is found only in the 16th section of the statute, and that he cannot bring the action till after a warrant has been issued and returned. The question in the case, then, is, whether the *laches* of the county treasurer in not issuing the warrant within twenty days, discharges the liability of the sureties and takes away the whole right of action. This question is presented in two aspects: 1st. Whether the *laches ipso facto* is a discharge in law. 2d. Whether the defendants, by showing actual injury to them by the *laches*, are discharged *in toto*, or to the extent of the injury.

Regarding these provisions of the statute as adopted for the

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*public benefit*, and not for the benefit of the sureties, it seems to me they are merely directory in respect to the time within which the warrant is to be used. This is palpably so as regards the collector, and he could never be heard to say that the warrant was void because not issued within twenty days, nor indeed, within the well settled rule of this state, could any party, upon whose person or property the process was to operate directly. (*People v. Allen*, 6 *Wend.* 486. *Gale v. Mead*, 2 *Denio*, 161. *Thomas v. Clapp*, 20 *Barb.* 165. *Pond v. Negus*, 3 *Mass. R.* 230 ; 21 *Pick.* 75. *Marchant v. Langworthy*, 6 *Hill*, 646 ; 3 *Denio*, 526. *Sedg. on Stat.* 368, &c. *People v. Cook*, 14 *Barb.* 259 ; 4 *Seld.* 88.) If these and numerous other cases that might be cited do not fully establish that these statutes are directory, *so far as Jewell is concerned*, certainly no argument or illustration of mine could do so.

I have seen no case in which a statute has been held to be both mandatory and directory in respect to the same subject matter or act to be performed under it ; and as these statutes are directory, so far as the principal against whom the warrant is to be issued is concerned, they are so also in respect to those to be incidentally affected by it. In this view the statutes are to be regarded as mere regulations adopted by the government for the conduct of public officers charged with certain duties, and the laches of those officers in the execution of such duties, cannot exonerate other officers and their sureties from the responsibility incurred by a neglect to perform their duties. (*United States v. Kirkpatrick*, 9 *Wheat.* 720 ; *Same v. Van Zant*, 11 *id.* 184 ; *Same v. Nicholl*, 21 *id.* 505. *Dox v. P. M. General*, 1 *Pet.* 325. *People v. Russell*, 4 *Wend.* 570. *Seymour v. Van Slyck*, 8 *id.* 403.) The case of *The People v. Jansen* (7 *John.* 332) is the only one that has fallen under my observation, in which it has been held that mere laches on the part of the government discharged the surety of a public officer. The facts of that case were extraordinary and peculiar, and seem to have forced the application of the principle adopted by the court. But the case, so

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far as I can discover, has never since been followed. In *The People v. Berner*, (13 *John*. 383,) the case is distinguished from *The People v. Jansen*, chiefly on the ground that "there must not only be negligence on the part of the creditor, but an injury resulting therefrom, in order to exonerate the security." In *The People v. Russell*, (4 *Wend*. 570,) it is expressly declared that *The People v. Jansen* is overruled, so far as it conflicts with the principle "that laches is not imputable to the government, and that statutory directions to public officers are given for its own security and convenience, and to regulate the conduct of its officers, but being directory form no part of the contract with the surety." And in *Seymour v. Van Slyck*, (8 *Wend*. 422,) the principle that laches is not imputable to the government, is approvingly repeated. This doctrine is founded, not on any extraordinary prerogative, but upon high considerations of public policy, which are ably set forth and vindicated by Mr. Justice Story in the *United States v. Kirkpatrick*, (9 *Wheat*. 735.)

An apt illustration of the intention of the legislature may be drawn from the provisions of the several sections of the statute. The warrant, by the terms of the 13th section, is not to be issued for the moneys payable to the town officers "*without proof by the oath of such town officers of the refusal or neglect of the collector to pay the same or account therefor.*" If the town officers fail to furnish such proof, and the warrant be issued for the amount, payable to the county treasurer only, is the obligation of the bond discharged as to the moneys payable to the former?

But the 16th section declares that the supervisor, in the suit to be brought by him, shall be entitled to recover "*the sum due from such collector,*" and the moneys so recovered shall be applied and paid by the supervisor in the same manner in which it was the duty of the collector to have applied and paid the same. It is obvious that the *sum due*, mentioned in this section, relates to and means the whole amount which the collector was required by his warrant to collect and

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pay to all the officers named therein, less the sum, if any, made upon the warrant, and yet as to part of this amount a warrant may not have been issued. There is no duty imposed upon the town officers to furnish proof by oath of the non-payment to them, except by implication, and where they do not furnish it the warrant can only go for the sum due the treasurer. Suppose that to be all collected on the warrant and paid over by the sheriff, is there no remedy upon the bond for the sums payable to the town? If not, then the neglect of the town officers to perform a duty nowhere expressly commanded, but without which no warrant for these moneys can issue, is a *laches* discharging the sureties *pro tanto* from the obligation of the bond. But the evident intent of the 16th section is, that all the amount due from the collector, and not simply the deficiency upon the warrant, shall be recovered in the action; and this, it seems to me, goes far to indicate that the legislature intended these several provisions to be mere *directory* regulations for the conduct of public officers, for the security and protection of the public, but forming no part of the contract with the collector or his sureties.

It is insisted, however, that the defendants gave evidence showing that they had sustained *an actual injury* by the neglect of the treasurer, and that the legal presumption from the evidence on that subject is, that the whole indebtedness would have been collected upon the warrant if issued in time. It is a legal presumption that legal process will produce its legitimate fruit; but it seems to me the point here raised is necessarily involved in those already discussed. If it be sound law that *laches* is not imputable to the government in such a case as this, then the consequences of the alleged neglect become an immaterial inquiry. A surety must first show in all cases *an obligation or duty in respect to him to do the act*, for the omission of which he complains, as well as the injury from the omission, before he can legally complain; and here, according to the views we have taken, he fails to show a legal or perfect duty. The plaintiff in this action is the representative of the

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public, but, in respect to the proceedings by warrant, the county treasurer was as independent of the supervisor as of the defendants. Either had the same lawful right or power to set him in motion as the other; and the neglect to exercise it is no more imputable to the one than to the other. Nor could the government enforce any more speedily the performance of his duties. They can indict and punish for misfeasance or nonfeasance, but by no possible agency could they anticipate and prevent his neglect. The liability of the defendants rests, therefore, upon those grounds of public policy which they are in common with every citizen interested in maintaining, and which cannot be departed from without the violation of general rights, more important than their individual loss.

The plaintiff must, therefore, have judgment upon the verdict.

GROVER, P. J., and MARVIN, J., concurred.

GREENE, J., dissented.

Judgment for the plaintiff.

[ERIE GENERAL TERM, February 8, 1858. *Grover, Greene, Marvin and Davis*, Justices.]

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JOHNSON vs. LEARN.

The revised statutes, in the provisions relative to the place where, and the persons to whom, property is to be assessed, as amended by chap. 176 of the laws of 1851, empower the assessors of a town to assess lands therein situated, occupied by a person other than the owner, (though owned by a non-resident,) to the owner or to the occupant, or as non-resident lands.

This leaves to the assessors a reasonable discretion, to be exercised with a view to the mode most likely to ensure the prompt and certain collection of the tax.

They have power to assess land to an owner, who is a non-resident, personally, provided it is "occupied by a person other than the owner;" and after they have adjudged land to be so occupied, and therefore assessable to the owner,

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this is a sufficient justification to the collector, even though the assessors may have misjudged; provided there is nothing in the warrant to show him that the land was not occupied by a person other than the owner.

If the assessors have, in form, sufficiently assessed a lot to a person as owner, personally, the court will assume, for the protection of the collector; that the circumstances necessary to give them jurisdiction to make the assessment, existed.

**A**PPEAL from a judgment of the Cattaraugus county court, reversing the judgment of a justice of the peace. On the trial of the action, it appeared that the plaintiff was a resident of the town of Ellicottville, and was the owner of a certain farm known as lot No. 48, in the town of Humphrey in the same county; that one Baxter, who resided on a place adjoining lot 48, put in and harvested a crop of oats on that lot in 1856, and in the summer of 1857 cut and put into the barn the hay on the place, and during both seasons had charge of the lot, "to keep off cattle," &c., and that he was employed by the plaintiff to do these things; that there was a barn on the place, but no house; that in 1857 the assessors of the town of Humphrey assessed said lot 48 to the plaintiff, placing his name in a part of the assessment roll called "non-resident roll," the name of the plaintiff appearing therein in a column headed "names of owners non-resident," followed in other columns by the number, part, quantity and value of the lot, and the amount of the tax; that to the original roll the affidavit of the assessors was subjoined, and annexed thereto was a warrant regular in form, signed by the supervisors of said county; that the defendant was collector of taxes of said town of Humphrey, and the warrant, &c. having been duly delivered to him, he called on the plaintiff for his tax; that the plaintiff refused to pay, and thereupon the defendant levied on a quantity of hay belonging to the plaintiff on lot 48, and sold it by virtue of his warrant, for said tax. The justice gave judgment for the plaintiff, which the county court reversed, on the ground that the justice erred in a point not embraced in this statement. The plaintiff appealed to this court.

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*D. H. Bolles*, for the appellant.

*A. G. Rice*, for the respondent.

*By the Court*, DAVIS, J. The defendant was collector of taxes of the town of Humphrey. He seized and sold the plaintiff's property by virtue of a warrant issued to him by the supervisors of Cattaraugus county. It is now settled by *Van Rensselaer v. Witbeck*, (3 Seld. 517,) that the warrant and assessment roll to which it is annexed, constitute one process, and a fatal defect appearing upon the face of either renders both void and the collector a trespasser; but it is equally well settled that if the process be regular on its face, or "in due form," it fully protects the officer executing it, whether the tax was legally assessed or not. (*Chegaray v. Jenkins*, 1 Seld. 376. *Savacool v. Boughton*, 5 Wend. 170. *Patchin v. Ritter*, 27 Barb. 34.) The real question upon this branch of the case, therefore, is not whether the plaintiff was *personally assessable* for his farm in Humphrey, but whether such facts appeared on the defendant's process as show that the assessors had no jurisdiction to assess him therefor. The form and place in which his name is inserted in the roll are by no means controlling, or indeed important, on this question. It may be said that the roll indicated to the collector that the plaintiff was a non-resident, but it at the same time showed that he was personally assessed for lot 48, *by name*, and that he was the person of whom the tax was to be collected under the direction of the warrant—to collect "*of the several persons named*," &c. His non-residence was not material if notwithstanding that he might be assessed upon the lot; for the statute expressly provides for the collection of taxes of non-residents of the town "assessed upon any estate of such person situated out of the ward or town in which he shall reside." (1 B. S. 919, § 10, 5th ed.) So far therefore as the collector is concerned, it is only material to inquire whether the plaintiff, being a non-resident, might under any circumstance be assessed *in perso-*

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*nam* for the lot in Humphrey. If he might, then we must assume, for the protection of the collector, that those circumstances existed, and that by reason of them the assessors had jurisdiction to make the assessment; because it is no part of his duty "to dispute the authority of his superiors, unless upon grounds apparent upon the face of their mandate. The law does not give him the means of ascertaining extrinsic facts for this purpose, nor does it attribute to him the capacity for reviewing the assessment on such facts, if they could be ascertained." (*Chegaray v. Jenkins*, 1 *Selden*, 376.)

The provisions of the revised statutes on the subject of the place where, and the person to whom, property is to be assessed, as amended by chapter 176 of the laws of 1851, so far as important to the question before us, are as follows:

"§ 1. Every person shall be assessed in the town or ward wherein he resides when the assessment is made, for all lands then owned by him within such town or ward and occupied by him or wholly unoccupied.

§ 2. Land occupied by a person other than the owner, may be assessed to the owner or occupant, or as non-resident lands.

§ 3. Unoccupied lands not owned by a person residing in a ward or town where the same are situated, shall be denominated lands of non-residents, and shall be assessed as hereinafter provided."

Before the amendment of 1851 the second section read as follows: "§ 2. Land owned by a person residing in the town or ward where the same is situated, but occupied by another person, may be assessed in the name of the owner or occupant."

The change in this section is significant and important, and seems fully to supply the *casus omissus* pointed out by Harris, J. in *Van Rensselaer v. Cottrell*, (7 *Barb.* 127.) In the *New York and Harlem Rail Road Co. v. Lyon*, (16 *Barb.* 651,) the court seem to have overlooked the amendment of 1851, and to have decided that case upon the statute as it stood prior to the amendment; or the force and effect of the change was misapprehended by the learned judge. To us it

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is obvious that the statute as amended empowers the assessors of a town to assess lands therein situated, *occupied by a person other than the owner, (though owned by a non-resident,) to the owner or to the occupant, or as non-resident lands*; and that this was the purpose of the amendment, seems apparent on comparing the present with the former section, and observing the words stricken out and those added by the legislature. Formerly, the land "occupied by a person other than the owner," which might have been assessed to "the owner or occupant," was only "land owned by a person residing in the town or ward where the same is situated," but by the amendment this limitation is wholly stricken out, and now all lands *occupied* by a person other than the owner may be assessed in either of three modes: to the owner, or to the occupant, or as non-resident lands. This leaves to the assessors a reasonable discretion in such cases, to be exercised with a view to the mode most likely to insure the prompt and certain collection of the tax.

The assessors of Humphrey, therefore, had power to assess lot 48 to the plaintiff, provided it was "land occupied by a person other than the owner." There is nothing in the defendant's process to show him that it was not so occupied. In form the assessors have sufficiently assessed the lot to the plaintiff *personally*, and having done that, *so far as the collector is concerned*, we have no farther inquiry to make. In adjudging the land to be occupied, and for that reason assessable to the plaintiff as owner, they may have wholly misjudged; but the collector has neither authority nor means to correct their error. It is enough for him that his process shows a tax assessed to the plaintiff as owner of a lot of land situate in Humphrey; and it is of no consequence that it also shows the plaintiff to be a non-resident, because he must presume that *the fact* which would give the assessors jurisdiction to assess the land to the plaintiff, although a non-resident, also existed.

From these views it follows that the warrant and assess-

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ment in this case were a protection to the defendant, and that the judgment of the county court should for that reason be affirmed.

ERIE GENERAL TERM, November 22, 1859. *Greene, Marvin and Davis, Justices.*]

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## THURMAN vs. ANDERSON and others.

Under the section of the code allowing a party to set up, in an action to enforce a legal right, an equitable as well as a legal defense, if a defendant in an action of ejectment shows an equitable right to the possession of the premises, as against the plaintiff, judgment should be given for him.

The defendants were in possession of land, under a lease for a term of years, from W., who had contracted to purchase the premises, and was in possession under his contract. After the making of the lease, and after the defendants had taken possession, the plaintiff, with notice of the defendant's rights, took an assignment of the contract of purchase, from W., and subsequently fulfilled the contract of purchase and obtained a deed of the premises. He then brought this action against the defendants, to recover the possession. *Held* that the plaintiff had no equity as against the defendants; and that, his legal title having relation to the contract, was subject to the right of the defendants to occupy under their lease. Judgment in favor of the plaintiff reversed, and new trial granted.

**A**CTION of ejectment, tried at the Oswego circuit in June, 1859, before DAVIES, J. without a jury. The defendants were in possession, under a lease for a term of years, from one West, who had contracted to purchase the premises, and was in possession under his contract. After the making of the lease, and after the defendants had taken possession, the plaintiff, with notice of the defendants' rights, took an assignment of the contract of purchase, from West, and subsequently fulfilled the contract of purchase and obtained a deed of the premises.

Judgment was given for the plaintiff; the justice at the circuit holding that the evidence did not prove any defense,

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legal or equitable, and that the plaintiff was entitled to recover. From that judgment the defendants appealed.

*A. Perry*, for the appellants.

*C. Andrews*, for the respondent.

*By the Court*, W. F. ALLEN, J. By the code, a party may set up, in an action to enforce a legal right, an equitable as well as a legal defense, (*Code*, § 150;) and if the defendants had an equitable right to the possession of the premises, as against the plaintiff, judgment should have been given for them. This was the error of the learned justice on the trial; for he expressly held and decided that the evidence offered by the defendants did not prove "any defense, either legal or equitable." The claim and title of the defendants is purely equitable, and must be judged by the rules of law applicable to titles of that character. But *œquitas sequitur legem* is a very common maxim, and is applied in those cases to which the rules of law are in terms applicable. Lord Hardwicke, after quoting the maxim, added: "When the court finds the rules of law right, it will follow them, but then it will likewise go beyond them." (*Paget v. Gee, Ambler's R.*, app. 810.)

In dealing with cases of an equitable nature, equity adopts and follows the analogies furnished by the rules of law. (1 *Story's Eq. Juris.* §§ 64, 64 a.) Applying to the equitable title of West, under whom both parties to this action claimed, the rules applicable to legal titles, the plaintiff would be estopped, as the grantee of West, from disputing or contradicting the title of his lessors.

This is not the case of a lease granted by one having no title, or a defective title, and who has subsequently acquired a valid title by the purchase of an outstanding title. The title of West, at the time of the granting of the lease to the defendants, was valid and differed only from the title which subsequently became vested in the plaintiff, in this, that the

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latter is a legal while the former was an equitable title. The equitable grew into the legal, but the one was not inconsistent with or adverse to the other. West's title was perfect as an equitable title, and the plaintiff has not acquired a title adverse or paramount to it. West was a purchaser under an executory contract, and as such was the equitable owner of the premises, subject to the future payments to be made by him. (*Moyer v. Hinman*, 3 Kern. 180.)

The vendor was the trustee of the legal title for the vendee, and the vendee the trustee of the vendor as to the unpaid purchase money. (*Story's Eq. Jur.* § 790 *et seq.*) The equitable title is recognized and protected by law, and is the subject of sale or mortgage; and the rights of the assignee and mortgagee will be protected as against every person claiming under the equitable owner with notice. (*Johnson v. Stagg*, 2 John. 510. *Jackson v. Bull*, 1 John. Cas. 81.) It was admitted upon the trial that West was in possession under the contract, that is, with the assent of the vendor, and as of right, by virtue of the contract. He had a possession which was transferable, and an equitable interest in, or title to, the premises, which was also the subject of a transfer. He could transfer both absolutely or conditionally. He might transfer his whole interest in the premises, and all his rights under the contract, or any portion of such interest and rights; or he might transfer the possession for a limited period, and the transferee in that case would acquire all the rights of a partial assignee of the contract, so far as should be necessary to protect his rights consistently with the terms of the contract. To that extent he would be subrogated to the rights of the vendee, under the contract, and might perform the same for his own protection and indemnity, and acquire all the rights of the vendee, as against the vendor. Any one who should thereafter succeed to the rights of the vendee under the contract, with notice of the rights of the transferee, would, within well established principles of law as well as equity, take in subordination to all their rights, and all equities growing out

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of his dealings with the vendee in respect to the estate. (*Parks v. Jackson*, 11 *Wend.* 442. *Gouverneur v. Lynch*, 2 *Paige*, 300.) The defendants in this case took possession under a lease, valid as against West, for a term which has not yet expired. The lessor could not, so long as they performed the covenants of the lease, oust them from their possession, whether he perfected his legal title by the payment of the purchase money upon his contract or not. It is not necessary, to sustain this proposition, to refer to the doctrine of estoppel, by which a lessor who has demised premises with a covenant for quiet possession, either express or implied, having no title and subsequently acquiring a title, is precluded from making use of that title to the prejudice of the lessee, and by which such subsequently acquired title is made to enure to the benefit of the lessee. Such is the very familiar rule. (*Jackson v. Murray*, 12 *John.* 201. *Jackson v. Stevens*, 13 *id.* 316. *Vanderheyden v. Crandall*, 2 *Denio*, 9.) Here West, the lessor, had an equitable title and an inchoate legal title, and when that should ripen into a perfect legal title he would nevertheless be in under the same title that he had at the time of the lease. His deed would operate by relation, and become effectual from the time of making his contract, so as to protect all intermediate interests. (*Moyer v. Hinman*, *supra*. *Parks v. Jackson*, *supra*. *Jackson v. Bull*, *supra*. *Jackson v. Raymond*, 1 *John. Cas.* 86, note. *Johnson v. Stagg*, 2 *John.* 510.) The plaintiff became the assignee of the contract of purchase with notice of the lease to the defendants, and of their equities. As assignee of the contract, he was charged with all the equities resulting from the lease, and in all respects occupied the position of West, the vendee and lessor, except as to the personal covenants of West as lessor. As the assignee of the vendee he could not, considering his right to possession under the contract, have evicted the lessees of West and put an end to the lease. His equitable title was precisely the title of West. West could not convey to him interests or rights over the premises, or against the

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occupants, which he had not. If the plaintiff had never obtained a deed of the premises from the original vendor, it will be conceded that he could not have disturbed the defendants in their possession, so long as they were entitled to retain possession under their lease. This being so, how could he acquire rights by performing the contract of purchase and paying the purchase price of the premises, which his assignee, the vendor, could not? The proof is that the plaintiff acquired his title, not in hostility to the contract to West, but in pursuance and fulfillment of it. His title, before equitable, became a legal title, but necessarily subject to all the legal incidents and equitable charges to which his equitable title was subject. Having purchased the equitable title with notice, he cannot be relieved from the consequences of that action, even by a subsequent purchase of the legal title. (1 *Story's Eq. Jur.* § 64, e.) But here is no purchase of the legal title. The payment, which was the consideration of the deed, is referable to the contract in pursuance of which the deed was given; and as the title of the vendee would have related back to the date of the contract, to preserve intermediate rights, the same effect must be given to the plaintiff's title acquired under the same contract. It is, in effect, as if West had purchased the deed and then conveyed to the plaintiff. (*Van Horne v. Crain*, 1 *Paige*, 455. *Jackson v. Hubble*, 1 *Cowen*, 613. *Bank of Utica v. Mersereau*, 3 *Barb. Ch. R.* 568.) The plaintiff received the deed because he was the assignee of West, as such assignee, and not independent of him. West cannot in this way get rid of the equities of his lessees; nor can the plaintiff thus profit by his acquisition of the legal title. Had there been an attempt to surrender the contract, equity would have entitled the defendants to come in for their own protection, and pay up the amount due and take the title as against West and all claiming under him with notice of their rights. The plaintiff has no equity, as against the defendants, and his legal title, having relation to the contract, as it does, is

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subject to the right of the defendants to occupy under their lease.

The judgment must be reversed, and a new trial granted ; costs to abide the event.

[ONONDAGA GENERAL TERM, January 3, 1860. *Pratt, Bacon, W. F. Allen and Mullin*, Justices.]

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### HUNGERFORD'S BANK vs. DODGE and others.

Accommodation indorsers of a promissory note made by a corporation are not estopped by the " Act to prohibit corporations from interposing the defense of usury in any action," passed April 6, 1860, from alleging usury, as a defense to an action brought against them and the corporation jointly, upon the note. *PRATT, J.* dissented.

Such indorsers are in no sense strangers to the contract of loan, so as to preclude them from setting up the defense of usury when sued upon their indorsement, or from seeking affirmative relief by action, on the ground of usury.

They are sureties of the borrower, and as such are embraced in the term " borrower," as used in the 8th section of the revised statutes relating to usury, and in the 4th section of the usury law of 1837.

THE plaintiff sued the Potsdam and Watertown Rail Road Company as maker, and the other defendants as indorsers of a promissory note, negotiated with the plaintiff and discounted by it for the benefit of the maker. The cause was tried at the Jefferson circuit, before *MASON, J.* without a jury, and it was proved that the indorsers were accommodation indorsers for the rail road company, and that the loan and discount to the company, upon and for which the note was given, was usurious. The rail road company suffered default, and the judge at circuit gave judgment against the other defendants, for the amount due upon the note for principal and interest, and from that judgment the defendants appealed.

*J. F. Starbuck*, for the appellants.

*C. Andrews*, for the respondents.

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W. F. ALLEN, J. The plaintiff loaned to the Potsdam and Watertown Rail Road Company money at a greater rate of interest than that allowed by law, and to secure the repayment of the money so loaned, with the illegal interest, the note in suit was given—the individual defendants indorsing as the sureties and for the accommodation of the rail road company, the maker of the note. Judgment at the circuit was given against the indorsers, upon the ground that they were estopped by the “Act to prohibit corporations from interposing the defense of usury in any action,” passed April 6, 1850, from alleging usury, as a defense to this action.

The defendants are in no sense strangers to the contract of loan, so as to preclude them from setting up the defense of usury when sued upon their indorsement, or from seeking affirmative relief by action, on the ground of usury. They are sureties of the borrower, and as such are embraced in the term “borrower,” as used in the 8th section of the revised statutes relating to usury, and in the 4th section of the usury law of 1837. (3 R. S. 73, § 8, and 74, § 13, 5th ed. *Post v. Bank of Utica*, 7 Hill, 391. *Cole v. Savage*, 10 Paige, 583. *Morse v. Hovey*, 9 id. 197.) A mere stranger to the transaction cannot, ordinarily, allege usury in respect to it, but a party to a deed or contract, as well as those standing in legal privity with him, can, unless estopped or under disability of some kind, always show it to be void when it is sought to be enforced against him. The defendants are not, certainly, strangers to their own contract of indorsement. They and they only can allege the invalidity of their contract. (*Dix v. Van Wyck*, 2 Hill, 522. *Green v. Morse*, 4 Barb. 332.) They are not necessarily restricted, by their relation to the principal, to the defenses which may be made available to the maker of the note. They are not joint contractors with the maker, and the contracts of the maker and indorsers are entirely distinct, and governed by different rules. The contract of the one is conditional, while that of the other is absolute. An action against an indorser may be defeated by want of de-

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mand and notice, by dealing with the principal debtor to his prejudice, when he occupies the position of a surety ; and an indorsement may be void as obtained by fraud, or for some other reason, while the contract of the maker is valid. So too one party to a note, maker or indorser, may be estopped by his own acts from setting up a defense true in fact and common to both, and which would be fatal, while the other parties may avail themselves of it. (*McKnight v. Wheeler*, 6 *Hill*, 492. *Holmes v. Williams*, 10 *Paige*, 326. 3 *Kern*. 316, *per Denio*, J. *Chamberlain v. Townsend*, 26 *Barb.* 611. *Dowe v. Schutt*, 2 *Denio*, 621. *Clark v. Sisson*, 4 *id.* 408. *Prescott v. Davis*, 4 *Barb.* 495.) As one party may be estopped by his own acts from setting up a defense, so he may be estopped by act and operation of law, or by a statute describing him by name, or by his status or condition, or as a contractor in a particular form, without affecting the parties not named. The contracts of makers and indorsers of promissory notes are treated as they are in truth, separate and several contracts. They may or may not be supported by the same consideration, but a joint action will not lie against them although they may now, by statute, be sued together ; but in such case the action is regarded, for all the purposes of protecting the rights of parties, and is prosecuted, as a several action against the several parties.

The validity of the contract of indorsement does not necessarily depend upon the validity of the engagement of the maker. It is true where both grow out of the same transaction, and depend upon the same consideration, if one is illegal both are necessarily so ; but it does not follow, that because one is not in a situation to allege the illegality, the other shall be precluded. The law which forbids the borrower in this case to allege usury, is very direct in its terms and simple in its provisions. "No corporation shall hereafter interpose the defense of usury." Assignees and representatives of corporations, although not named, are within the spirit of the act, and therefore within its terms, and they are not permitted to avail themselves of a defense from which the corporation is

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excluded. (*Curtis v. Leavitt*, 15 N. Y. Rep. 296, pl. 8.) Whether, under all circumstances, creditors and others claiming under a corporation would be within the prohibition, is not settled, and is not free from doubt, but need not be considered here. So, too, although the letter of the act merely forbids corporations from interposing the *defense* of usury, it has been very properly held, that it necessarily takes from the corporation the right to assert the usury in any way defensively, and in a way to vacate or set aside a contract as well by affirmative action as by way of a defense to an action on the contract. It takes from the corporation the *objection* of usury. (*Butterworth v. O'Brien*, 28 Barb. 187.) This being so, the language used by the learned judge of the court of appeals, in *Curtis v. Leavitt*, was appropriate and expressive. The undertaking of a corporation, formed upon a usurious consideration, is *quoad* the corporation and its receiver or assignee, as if no statute of usury existed. A statute is as no statute to one who is prohibited to use or claim the benefit of it. It is as a repealed statute to him. His rights are not affected by it. Judge Comstock says, at page 85, "My impression is that the act must be construed as a repeal of the statute of usury, as to all contracts of corporations stipulating to pay interest," &c. This is doubtless true; but that does not extend necessarily to collateral contracts of others. Here we have the agreement for a loan usurious in itself, consummated by the loan, and the absolute promise or contract of the corporation to pay, as to which it is said and need not be decided, the statute of usury is repealed, and the collateral and conditional contract of the sureties, as to whom the statute of usury is in full force. Judge Brown, at page 154, better expresses my idea of the effect and operation of the statute, and refers to it as operating upon the condition of the artificial beings named, and thus, as to them, incidentally affecting the contract. He says, "The condition of this class of beings becomes the same as if the usury laws never existed." The statute operates directly upon the person, and only indirectly

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and incidentally upon the contract. Interpretation has no place in respect to a statute or other instrument which is perfectly plain and easy to be understood, giving the words their ordinary and usual signification. The statute was passed under the pressure of the case of the *Dry Dock Bank v. The American Life Insurance and Trust Company*, in which the plaintiff was exonerated from the payment of a very large sum of money loaned under a contract held to be usurious, (3 Comst. 344,) and was not designed especially to give needy corporations the advantage over needy individuals competing for loans in the money market. It may have had that effect, but such was not its primary object, which was to hold corporations to their engagements, irrespective of the general policy of the usury laws as affecting the contracts of individuals. The language chosen is well calculated to carry out the primary object of the act, and is not so general as to interfere with the usury laws, or to affect individuals. If the statute of 1850 by implication repeals the usury laws, so far as contracts for loans to corporations are concerned, as is claimed, then a repeal of that act would not so restore the usury laws as to invalidate contracts made during its existence, by bringing them within the penalty imposed by the usury laws. A repeal of the act could not affect the contract; and yet my impression is, that a repeal of that act would place all contracts of corporations on the same footing with contracts made by individuals. The statute would preclude a corporation surety from interposing the defense of usury, although the individual and principal debtor not within the act would not be estopped. It certainly cannot be claimed that all parties to a promissory note or bill of exchange, in which the name of a corporation is found as maker, drawer, indorser or acceptor, are by the act of 1850 debarred from the prohibition of the statutes of usury. It is supposed that there is some mysterious connection between the contracts of the maker and indorsers by means of the loan which constitutes the consideration of both, by which the disabilities of the maker are transferred to the

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indorsers. But I am unable to see by what process. If the legislature had said, as they might, that the statutes of usury should not apply to contracts for the loan or forbearance of money to corporations, the case would be different, and the plaintiff's counsel would be right; but it is not so written, and we are not permitted to go beyond the statute. If such had been the substance of the act, then it would not have affected the liability of corporations upon contracts made in other states, and void by the usury laws of those states. Our statutes could not repeal foreign statutes, and they could have been pleaded in our courts. But the statute does in truth, as intimated by Judge Comstock in *Curtis v. Leavitt*, prohibit corporations from interposing in our courts the usury laws of other states and countries as a defense to their contracts, which shows that the statute operates not by way of a repeal of our statutes of usury, but simply upon the person; that the prohibition is personal. I do not suppose that it would make any difference if the action was against the defendants as joint borrowers with the rail road corporation, and upon a joint contract. But it is not so, and the contracts are as independent as if written on separate pieces of paper. Suppose the defendants had loaned their note to the rail road company, payable to bearer, and the company without indorsement had sold it for less than its face, so that it would have been void for usury, would the fact that the loan was made to a corporation bring the parties to the note within the provisions of the act of 1850, and exclude them from the benefit of the usury laws? Certainly not, as I think; and if not, then the fact that the corporation indorsed the note would not affect the makers. And to go one step farther: the fact that the corporation borrowed the indorsement rather than the note of the individuals, would not vary the rights of the parties. By statute, (3 R. S. 73, § 5, 5th ed.) "All bonds, bills, notes, assurances, conveyances, all other contracts or securities whatsoever, &c., whereupon or whereby there shall be reserved or taken a greater sum or value for the loan or forbearance of any money,

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&c. than is prescribed by statute, shall be void." An indorsement by way of security is within the provision. The note and indorsement received vitality by the transfer to secure the loan, and depend upon it as a consideration ; and if that is illegal, the contract fails. It is no answer to the plea of usury, when interposed by the indorser, to say that the maker is estopped, or by law precluded from alleging the defense. When the maker interposes the defense, the estoppel may be replied. It is as to the contract of the corporation that the statute of usury is *quasi* repealed, not as to the contract of the individual indorsers. It is only by a construction not warranted by the language of the act, nor required by any necessity, nor necessary to give full effect to the statute and the intent of the legislature as expressed in it, that it can be claimed that the loan to a corporation, and all securities connected with it, are made valid by being taken out of the operation of the statutes of usury by the act of 1850, and I am not prepared to go that length. We are referred to two cases, (*Book v. Lanman*, 24 Penn. Rep. 435, and *The Market Bank of Troy v. Smith*, decided by the United States district court for Wisconsin, and reported in the *Am. Law Reg.* for September, 1859,) in which the same construction was given to the statute, and with the reasoning I am entirely satisfied. Perhaps a shorter answer to the defense interposed in those states would have been, that the laws of this state affecting the remedy had no extra territorial force, and such would have been consistent with the view taken of the statute. I think the learned justice erred in his application of the statute, at the circuit, and that the judgment must be reversed and a new trial granted ; costs to abide the event.

BACON, J. concurred.

PRATT, J. dissented.

New trial granted.

[ONONDAGA GENERAL TERM, JANUARY 8, 1860. Pratt, Bacon and W. F. Allen, Justices.]

WILLIAM MCCRAY *vs.* MARY MCCRAY.

In an action to recover possession of a farm, it was proved that a son of the plaintiff married the defendant, in 1849, and had two children by her, one of whom was living; that the son, in 1850, went into possession of the farm, by permission of the plaintiff, and occupied it until his death, in 1855; the plaintiff, during such occupancy, frequently saying the farm was his son's. The defendant offered to prove that her husband worked for the plaintiff about eight years after he became of age, at the plaintiff's request; that in consideration thereof, and of love and affection, the plaintiff gave the farm, by parol, to his son, who, in virtue thereof, entered on the premises, took possession, and made improvements, and paid taxes, on it, as his own, by and with the approbation of the plaintiff; that the plaintiff always treated his son as owner, and at the deathbed of the latter informed him and his wife that he would never disturb them. The evidence was excluded.

*Held* that the evidence offered should have been received; and that it would have entitled the defendant not only to hold the farm, but to receive such a conveyance from the plaintiff as would vest in her and her surviving child the title to the farm, according to their respective rights as widow, mother, daughter and heirs. New trial granted. CAMPBELL, J. dissented.

THIS action was brought to recover possession of a farm of land containing 149 acres. The action was tried at the Chenango circuit in September, 1859. It was proved that a son of the plaintiff married the defendant in 1849, by whom she had two daughters, one of whom was living and under six years of age at the time of the trial. The son went into possession of the farm, by permission of the plaintiff, in the spring of 1850; and lived on it with the defendant, and worked it, until his death in November, 1855. He left no will; and the defendant continued in possession of the farm and worked it, down to the time of the trial—her daughter that was living residing with her. The other daughter died after the decease of her father. The defendant's husband was about thirty years of age when he married the defendant. Before the defendant's husband died, the plaintiff frequently said the farm was his son's. The defendant, under her answer setting up the facts, offered to prove that her husband worked for the plaintiff about eight years after he came of age, at the plaintiff's request; that in consideration thereof, and of love

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and affection, the plaintiff gave the farm by parol to his son, who, in virtue thereof, entered on the premises in question, took possession and made improvements, and paid taxes on it as his own, by and with the approval of the plaintiff; that the plaintiff always treated his son as owner, and at his death-bed informed him and his wife that he would never disturb them. The judge refused to allow the defendant to prove her offer and each and every part thereof; to which refusal the defendant excepted. The judge directed the jury to find a verdict for the plaintiff; to which direction the defendant excepted. The jury rendered a verdict for the plaintiff. The judge directed that the exceptions be heard in the first instance at a general term, and suspended judgment in the mean time.

*Henry R. Mygatt*, for the defendant, cited and commented upon the following authorities: *Bond v. Hopkins*, 1 *Schoales & Lefroy's Rep.* 413; *Morphet v. Jones*, 1 *Swanst.* 181; *Lacon v. Martius*, 3 *Atk.* 1; 1 *Colle's Parl. Cas.* 108; 17 *Eng. Law and Eq.* 212; 3 *Gill & J.* 127; 6 *Rand.* 605; 1 *Harrington*, 532; 21 *Missouri Rep.* 331; 20 *id.* 81; 14 *Georgia Rep.* 683; *Rathbun v. Rathbun*, 6 *Barb.* 99; 1 *John. Ch.* 274; 14 *John.* 15; 4 *Blackford*, 383; 9 *Alabama Rep.* 756; 8 *N. H. Rep.* 9; 18 *Conn. R.* 222; 9 *N. H. Rep.* 386; 1 *Watts & S.* 383; 3 *Watts*, 255; 1 *Binney*, 378; 6 *Watts*, 509; 12 *Penn. Rep.* 174; 19 *id.* 469; 6 *Maryland Rep.* 443; 3 *Gill*, 138; *Rhodes v. Rhodes*, 3 *Sand. Ch.* 279; 3 *Dess.* 593.

*Lester Chase*, for the plaintiff, cited and commented upon the following authorities: 2 *R. S.* 134, § 6; 1 *id.* 738, §§ 136, 137; *Jackson v. Rogers*, 1 *John. Cas.* 33; *S. C.*, 2 *Caines' Cases in Error*, 314; *Jackson v. Ellis*, 13 *John.* 118; *Jackson v. Whitbeck*, 6 *Cowen*, 632; 2 *Humphrey*, 174; 1 *Bailey's Ch.* 175; 8 *B. Monroe*, 566; 19 *Penn. Rep.* 461.

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BALCOM, J. The defendant is guardian in socage of her infant daughter ; (1 *R. S.* 718, §§ 5, 6 ; ) and if the daughter is entitled to hold the farm in question, the defendant is rightfully in possession of it as her guardian in socage. (2 *id.* 153, § 20. 17 *Wend.* 75: 19 *id.* 306.) Besides, the defendant has a dower right in the farm, and is heir to her deceased daughter. She may claim the farm both as heir and guardian ; and is therefore in a position to assert an equitable right to it, if her husband had such a right at the time of his death.

The decisions mainly relied on by the plaintiff's counsel were all made in actions of ejectment, before equitable defenses could be interposed in such actions. It must be conceded, however, that they show that a mere parol gift of land, though possession be delivered to the donee, only makes him a tenant at will of the donor. I do not understand the defendant's counsel to dispute this proposition : if I did understand him to deny it, I should surely say he was wrong.

The defendant's offer was not to prove a mere parol gift of the farm by the plaintiff to his son ; it was much more. She offered to show a parol contract, part performance of it by the plaintiff, and entire performance of it on the part of her husband. It is inaccurate to say the transaction she offered to prove only amounted to a mere gift of the farm by the plaintiff to his son. (See *Moore v. Small*, 19 *Penn. Rep.* 469 ; 3 *Gill*, 138 ; *Hart v. Hart*, 3 *Des.* 592.) It is true her counsel called it a gift, at the trial. I think, in doing so, he misnamed it, because the plaintiff's love and affection for his son was one of its ingredients. The most material part of the offer was to prove that the defendant's husband labored eight years for the plaintiff, at his request ; for which labor the latter, by reason of his love and affection for his son, paid him with this farm. Most clearly, if the labor was performed at the plaintiff's request, he was legally bound to pay his son for it. The offer goes further : it shows that the son accepted the farm in payment for his labor, took possession of it—held it five years, until he died—made improvements on it and paid

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the taxes on it as his own, by and with the approval of the plaintiff; that the plaintiff always treated his son as the owner of the farm, and at his deathbed informed him and the defendant he would never disturb them. Now considering the lapse of time since the son performed the labor for the plaintiff, the utter impossibility of the administrator of the son ever recovering compensation therefor, or for the improvements the son made upon the farm, and the immeasurable injustice that would flow by permitting the plaintiff to recover the farm, even if he would not plead the statute of limitations to any personal action the administrator should bring against him, it seems to me the plaintiff should not be permitted to rescind this parol contract for the want of a deed or writing so signed as to vest the title to the farm in his son. (*See Bond v. Hopkins*, 1 *Sch. & Lef. Rep.* 433.) "The contract was so far in part executed as to render it unjust to rescind the same." (19 *Penn. Rep.* 461.) If there was such a parol contract, it is clearly against conscience, and fraudulent, for the plaintiff now to repudiate it. I think the proof offered would have brought the case within the principle applied by the assistant vice chancellor in *Rhodes v. Rhodes*, (3 *Sand. Ch. R.* 279.) It should not have been rejected upon any adjudication in this state; (*see Parkhurst v. Van Cortland*, 14 *John.* 15; *Malins v. Brown*, 4 *Comst.* 403;) and I think the weight of authority in other states and in England is in favor of its admission. It seems to me the judge must have construed the offer to be one to prove a mere parol gift of the farm; whereas I construe it to be an offer to show a parol contract for the farm, founded on a valuable consideration, so far in part executed as to render it impossible to do substantial justice to the parties without enforcing it.

It is unavailing for the plaintiff's counsel to argue, that if the defense in this action prevails, our statute, which declares that estates or interests in lands shall not be created, granted, assigned, surrendered or declared, except by deed or writing properly executed, means nothing. We could not now hold,

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if we would, that no parol contract affecting interests in lands shall be enforced, though partly performed. The equity rule is wisely settled the other way. The only duty we now have to perform in an equity case, or where an equitable defense is interposed, is to see that the parol contract concerning the land in question is taken out of the operation of the statute, by such a part performance as renders it impossible to do substantial justice to the parties without enforcing it.

My conclusion in this case is, that the evidence offered by the defendant should have been received; and that it would have entitled the defendant not only to hold the farm, but to such a conveyance from the plaintiff as would vest in her and her daughter the title to the farm, according to their respective rights as widow, mother, daughter and heirs.

The verdict in the action should be set aside and a new trial granted; costs to abide the event.

MASON, J. concurred.

CAMPBELL, J. dissented.

New trial granted.

[BROOME GENERAL TERM, January 24, 1860. *Mason, Balcom and Campbell, Justices.*]

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SIMPSON and wife vs. MOORE and others.

A testator, by his will, directed his executors to retain and invest, and keep invested from time to time, one sixth part of his estate, upon real estate security, or in stocks, and to apply and pay over the *income* thereof, to his wife, during her life. A portion of the trust fund was invested by the trustee appointed in the place of the executor, in the capital stock of the National Bank. The charter of the bank expired January 1, 1857, and the bank reorganized under the general banking law. Preparatory to the reorganization, the bank made and declared a dividend, over and above the par value of the stock, of 18 per cent; leaving it to the option of the stockholders to take stock in the new bank, adding the said dividend of 18 per cent, or to take the same in money. The trustee elected, instead of money,

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to receive the dividend in the new stock, and received the same, and held the certificates therefor.

*Held*, that the testator intended all the income of the property which he ordered to be converted should be paid to his wife, but that the capital so invested should be preserved.

*Held also*, that under the case of *Clarkson v. Clarkson*, (18 Barb. 646,) the payment of the 18 per cent by the bank must be considered as a dividend; but as it contained part of what was held as capital, when the stock was purchased, so much thereof as was necessary to make up the original investment, over and above the par value of the stock taken by the trustee in exchange, should be retained by him; and that the residue belonged to the plaintiff.

THE complaint in this action alleged that John Wilson, formerly of the city of New York, died on the 21st of December, 1837, leaving a will, which was afterwards admitted to probate, and recorded in the office of the surrogate of New York. That by said will the testator bequeathed to the plaintiff Mary Ann Simpson, then his wife, the income during her life, of one sixth part of his estate, in these words: "One sixth part of all my estate (including the proceeds of my real estate sold) I direct my executors to retain and invest, and keep invested from time to time upon real estate security or in stocks by them deemed safe, and to apply and pay over the income thereof, from time to time, as it may be received, to my wife, Mary Ann Wilson, during her life, to be to her sole and separate use in the event of an after-marriage." The will further directed, that upon the death of the plaintiff the said one sixth should be divided among the children of the testator and their representatives; subject to a power of appointment to the plaintiff, as to three fifths of the fund, among her three children. The testator left him surviving his widow, Mary Ann Wilson, who had since intermarried with the plaintiff John Simpson, her present husband. He also left three children, who were made defendants, together with A. T. Moore, who was, on the 17th of September, 1856, appointed by the court trustee under the will, in the place of James McBride, the executor and trustee named in the will, who had died. The complaint further alleged that, at the time of the

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appointment of Moore as such trustee, a portion of the trust fund was in the capital stock of the National Bank of the said city, it having been so invested by McBride, the former trustee, in the year 1844. That it amounted to 69 shares, of \$50 each, and for which McBride paid \$50 per share. That the charter of the National Bank expired on the 1st of January, 1857. That the bank reorganized under the general banking law, and preparatory thereto made and declared a dividend over and above the estimated par value of said stock, of 18 per cent, and left it to the option of its stockholders to take its stock under its new incorporation, adding the said dividend of 18 per cent, or to take the same in money; that Moore, as such trustee, elected, instead of money, to receive said dividend in the new stock, and received the same; and that he now holds and claims to hold, as such trustee, the stock certificates of the bank, for the same.

The complaint then alleged that a certain other portion of the trust fund, at the time of Moore's appointment as trustee, was invested in the capital stock of the Merchants' Bank, of the city of New York; having been so invested by McBride in October, 1848; and that it amounted to 50 shares of \$50 each, and cost \$50 per share. That the charter of the bank expired January 1, 1857. That the bank continued or renewed its corporate existence under the general banking law, and preparatory thereto, made and declared a dividend over and above the estimated par value of the stock, of 26 per cent, and left it to the option of the stockholders to take its stock under its new incorporation, adding the said dividend of 26 per cent to the original shares, or to receive the said dividend of 26 per cent in money. And that Moore, as such trustee, elected, instead of money, to receive said dividend in the new stock, and so received the same, and holds the certificates of the bank therefor. The plaintiffs claimed and alleged, however, that such dividend did not belong to the trust estate, but belonged to, and was the property of the plaintiff, Mary Ann Simpson, as "income," under the will. The complaint

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alleged that the plaintiff, Mrs. Simpson, had demanded of the trustee to have the said certificates for the amount of said final dividends, and that the same be transferred to her, but that he refused to transfer them, claiming that the same belonged to the trust estate and not to the plaintiff. The plaintiffs prayed judgment that the defendants be required to transfer to Mrs. Simpson the said bank stock certificates for said dividends of 18 and 26 per cent, respectively, or that he pay to her the amount thereof, in cash, together with costs.

The infant defendants put in general answers, by their guardian ad litem, submitting their rights to the protection of the court. The adult defendants admitted most of the facts set forth in the complaint, but denied that the said Merchants' Bank, or the National Bank, made or declared dividends over and above the estimated par value of their stock, of 18 and 26 per cent respectively, or left it to the option of the stockholders to take stock under the new organization, adding the said alleged dividends of 18 and 26 per cent in money. On the contrary, they alleged that the said 18 and 26 per cent was the enhanced value of the stocks respectively, and formed a part of the principal of said investment, and that the defendant, as such trustee, elected, instead of money, to receive said enhanced value in the said new stock, and so received the same. And they claimed and insisted that the certificates for the additional stock belonged to, and formed part of the trust estate, and not the income thereof.

*Flanagan & Cummings*, for the plaintiffs.

*Cambreling & Pyne*, for the defendants Wilson and Cipriant.

*B. W. Bonney*, guardian ad litem for the infant defendants, in person.

INGRAHAM, J. In this case I am of the opinion that the testator intended all the income of the property which he or-

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dered to be invested should be paid to the wife, but that the capital so invested should be preserved.

Under the case of *Clarkson v. Clarkson*, (18 Barb. 646,) the payments in question must be considered as dividends; but as they contained part of what was held as capital when the stock was purchased, so much thereof as was necessary to make up the original investment, over and above the par value of the stock taken by the trustee in exchange, should be retained by him, and the residue belongs to the plaintiff.

If the parties do not agree on the amount to be retained by the trustee, a reference will be ordered by the court on settling the order.

The costs of the parties to be paid out of the fund; such costs as to the defendant Cipriant only to be paid, down to the time of the decease of his wife.

[NEW YORK SPECIAL TERM, December 23, 1859. Ingraham, Justice.]

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 JONES and others vs. BUTLER and others.
 

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An objection to the validity of a marriage settlement, on the ground that the parties to it were infants, can only be made by the parties themselves.

It is not, for that cause, void, but voidable merely, at the option of the infants on arriving at full age. If they do not, within a reasonable time, seek to avoid it, they will be considered as ratifying it.

The objection cannot be made by the trustee acting under it and holding property received by virtue of it, when a court of equity is asked to compel him to render an account.

He cannot dispute the authority under which he holds the trust funds, and seek, in that manner, to retain the trust property to his own use.

Where a deed is made to a trustee, which recites that the trustee has determined to invest \$5000 of the trust property in the lots thereby conveyed, and which conveys the land in trust to and for the purposes of the trust, the admissions and trusts in such deed are to be taken most strongly against the trustee; especially where the admission relates to matters particularly within the knowledge of the party making it.

**A**CTION against a trustee under a marriage settlement, for an account, and to have the trustee changed.

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INGRAHAM, J. This action is brought against a trustee, to obtain an account, and to have the trustee changed, on the ground of a misappropriation of the trust property. The trust arose under a marriage settlement made in 1813. At the time of its execution both of the parties to it were under age. The defendant Butler was appointed trustee, in the place of the original trustee, within one or two years thereafter. In 1816 a conveyance was made to the trustee, of lots in Broome street, which recited that the trustee had determined to invest \$5000 of the trust property in these lots, and which conveyed the land in trust to and for the purposes of the trust. Since that time the wife has died, and the plaintiffs claim the property under the marriage settlement and the trust deed.

The defendant denies that the lots were ever purchased with the proceeds of the trust property, and claims that he has a release from the parties to the trust deed, vesting the property in himself. The trustee has since conveyed the property to his daughter, who is also made a party to the action.

The objection to the validity of the marriage settlement, because the parties to it were infants, can only be made by the parties themselves. It is not, for that cause, void, but merely voidable, at the option of the infants on arriving at age. If they do not, within a reasonable time, seek to avoid it, they will be considered as ratifying it. Least of all should such an objection be made by the trustee acting under it and holding property received by virtue thereof, when a court of equity is asked to compel him to render an account. Whether the contract between the parties is to be upheld or not, he cannot dispute the authority under which he holds the trust funds, and seek, in such a way, to retain the trust property to his own use. But independent of these reasons, the parties themselves, after coming of age, recognized the deed, and ratified it by such recognition.

The admissions in the trust deed, that the trustee had invested \$5000 of the trust fund in the Broome street property, and the trusts in the deed, are to be taken most strongly

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against the trustee. More especially is this rule applicable to a case where the admission relates to matters particularly within the knowledge of the party making it. It may be that the defendant may be able to show that this consideration was never paid from the estate. Whether he could relieve himself from the express trusts contained in the deed by such evidence is, to say the least, doubtful. As the case stands before me there is nothing to warrant such a conclusion, and it is therefore unnecessary now to pass upon that question. At any rate, as the evidence now is, it is proper that an accounting should take place, and it will then appear whether at the time of the giving of this deed the defendant had in his possession sufficient of the trust property for this purpose.

It is contended that the marriage settlement made no disposition of the property in case the husband should survive the wife, and that the property therefore has vested in the husband, by the death of his wife. By the deed it is provided that the income shall be applied to the joint use of husband and wife during their lives, and to the husband during the remainder of his life, should he survive the wife. This limitation to the husband, of the income, during his life, and the subsequent provisions of the deed, as to the rights of the children after the death of the husband and wife, sufficiently show the intent of the parties to have been to give the husband merely the income of the property after the death of his wife, during the remainder of his life, and not to give him the whole property on her death.

Whether, therefore, the children claim as *cestuis que trust* under the marriage settlement, or as *thé heirs* at law of the mother, would be immaterial. The facts are sufficiently set out in the complaint to entitle them to relief in either character. And where the facts appear in the complaint, the court is to give such relief as the parties are entitled to; whether it be asked for or not, in the prayer of the complaint. (2 *Kern*. 336.) There are other questions which may hereafter arise, on the final disposition of this case, in addition to those refer-

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red to, which will require further explanation before the trustee can succeed in relieving himself of the trust, as proposed by him.

The attempt to obtain a release from the parents, so as to deprive the plaintiffs of their claims, the mode in which the property was conveyed to the daughter without consideration, and other matters which it is not necessary here to refer to, all tend to show that the defendant has not been acting in the faithful discharge of his duty as trustee and solely for the benefit of those for whom he held the trust.

But as I have arrived at the conclusion that the trustee must render the account, so as to ascertain whether he had, at the time, in his hands, funds from which the lands purchased in Broome street could be paid for, I shall also refer it to the same referee to inquire whether the trustee has so managed the trust funds as to render it necessary, for the protection of the plaintiff's interests, that the trustee should be changed, and that he report the proofs, with his opinion thereon. And all further directions are reserved until the coming in of such report.

• Reference ordered to William Kent.

[NEW YORK SPECIAL TERM, December 28, 1859. *Ingraham*, Justice.]

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**LORING vs. THE UNITED STATES VULCANIZED GUTTA PERCHA  
BELTING AND PACKING COMPANY, and SARGENT.**

An assignment executed by a manufacturing corporation, of all its property, to a trustee, in trust for the benefit of creditors, which expressly admits that it is made in consequence of the company having become unable to pay its debts, is absolutely void, by statute. (1 R. S. 608, § 4.)

The court, in the 1st district, will regard the decision of a general term, in any other district, as controlling, until reversed by the court of appeals; unless, from some special reason appearing, it is clearly erroneous.

**T**HIS action was brought by the plaintiff, in behalf of himself and all other creditors of the defendant, who might

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choose to come in and contribute to the expenses of the suit. The defendant was a corporation, created and formed under and by virtue of the act of the legislature passed February 17, 1848, entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," and the acts amending the same. The plaintiff was a judgment creditor of the defendant, and had issued executions on his judgment, which had been returned unsatisfied. The complaint alleged that the defendant had executed a general assignment of all its property to John O. Sargent, in trust for the benefit of creditors; that the said assignment was made by the company in contemplation of its insolvency, and that the company was now insolvent; that the assignment was made by the company with the intent to delay, hinder and defraud creditors, and was contrary to the provisions of the revised statutes, entitled "Special provisions relating to certain corporations," and wholly void. For these and other reasons not necessary to be mentioned, the plaintiff demanded judgment that the assignment be adjudged void, as against the plaintiff and other creditors of the defendant; that a receiver be appointed, &c.

The second clause of the assignment was as follows: "Whereas the said party of the first part is indebted to divers persons in considerable sums of money which it is unable to pay with punctuality or in full, and is desirous of making a fair and equitable distribution of its property and effects among its creditors."

The assignment was dated and executed the 24th day of December, 1858.

The defendant, by its answer, denied that the assignment was made in contemplation of insolvency, or with the intent to delay, hinder or defraud creditors. An injunction having been previously granted, and a receiver appointed, the plaintiff now applied for judgment, upon the complaint and answer.

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*B. Roelker*, for the plaintiff.

*E. Sprout*, for the defendant.

INGRAHAM, J. Under the decision in the case of *Harris v. Thompson*, (15 Barb. 62,) I must hold the assignment in this case to be void. It expressly admits that it is made in consequence of the company having become unable to pay its debts. The case referred to decides that the 4th section of the statute (1 R. S. 603) applies to such corporations, and that assignments made by them in view of insolvency are void.

That decision was made by a general term of the supreme court; and we some time since held in this district that we should regard the decision of a general term in any other district as controlling, until reversed by the court of appeals; unless, from some special reason appearing, it was clearly erroneous.

Judgment ordered for the plaintiff, declaring the assignment void, &c.

[NEW YORK SPECIAL TERM, December 23, 1859. *Ingraham*, Justice.]

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VILLAGE OF WARREN vs. PHILIPS and others.

A bond, executed by the collector of an incorporated village, and his sureties, to the village, by its corporate name, after naming the obligors, and describing them as inhabitants of the village, declared that they were "held and firmly bound in the penal sum of eight hundred dollars, to be paid to the trustees or their successors in office." In the recital, preceding the condition, it was stated that P., one of the obligors, had been chosen collector of said village; and the bond was conditioned for the faithful performance of his duties as such collector. Held that the bond, although not in terms executed to the village by its corporate name, was a substantial compliance with the provisions of the statute, so far as related to the obligees therein, and was valid and obligatory upon the parties thereto.

As soon as a bond, executed by a village collector and his sureties, is accepted by the trustees of the village, it becomes a valid and obligatory instrument;

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Village of Warren v. Philips.

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although the approval of such bond is manifested only by a resolution, passed by the trustees.

The provision in the statute, for the indorsement of a certificate upon the bond, by the trustees, showing their approval of the sureties, is merely directory; and the omission of such certificate will not affect the instrument itself, or its validity.

An objection that the complaint is not sufficiently certain, in its allegations, cannot be taken by demurrer. The defendant's remedy is by motion to make the complaint more definite and certain in the particular specified.

Although no express authority be given to a village corporation, by its act of incorporation, for the prosecution of suits for debts and other demands, it may, under the general powers conferred upon all corporations, sue upon a bond given to the corporation by the village collector; and this, without waiting until a warrant has been issued by the county treasurer, pursuant to the statute, (1 R. S. 400, § 13,) for the collection of the unpaid tax out of the collector's individual property, and has been returned unsatisfied.

That provision relates only to warrants issued to collectors of taxes, by the board of supervisors; and does not apply to collectors of city or village taxes, except in special cases where it is made applicable.

**A**PPEAL from a judgment rendered at a special term, overruling a demurrer to the complaint. The complaint alleged that the plaintiffs were a corporation under the general statutes of the state of New York, for the incorporation of villages, passed in the year 1847; that at an election for officers of said village of Warren, held in said village, in March, 1857, the defendant John Philips was duly elected collector for said village; and afterwards, for the purpose of renewing his warrant for the collection of taxes of said village, the said Philips, and the defendants, Samson Marks, jun. and James Creney, executed and delivered to the said village a bond, of which the following is a copy:

"Know all men by these presents, that we, John Philips, Samson Marks, jun. and James Creney, of the village of Warren, in the town of Haverstraw, in the county of Rockland, state of New York, are held and firmly bound in the penal sum of eight hundred dollars, to be paid to the trustees or their successors in office; to which payment well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these pres-

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ents. Sealed with our seals, and dated the 4th day of February, A. D. 1858. Whereas the above bounden John Philips has been chosen collector of said village of Warren, now therefore the condition of this obligation is such, that if the said John Philips shall well and faithfully execute his duties as such collector, the above obligation to be void, else to remain in full force and virtue."

The plaintiff further showed that said bond was approved by the trustees of Warren village, at a subsequent meeting of said trustees, by resolution entered in the minutes of the trustees, and a tax list, with a warrant thereto annexed, was thereupon issued to said Philips for the collection of the taxes of said village, which warrant expired on or about the 15th day of March, 1858; that Philips had failed to execute his duties as such collector, in that he had collected a large amount of money prior to the expiration of his said warrant, and that he had neglected and refused to pay over to the treasurer of said village the sum of \$286.76 of the moneys so collected by him, although often requested so to do; and that the defendants Samson Marks, jun. and James Crenney had had notice of such default, and also refused to pay said amount or any part thereof. Wherefore the plaintiffs demanded judgment against the defendants for the sum of \$286.76, together with interest thereon from the 15th day of March, 1858.

To this complaint the defendants demurred, on the ground that it appeared upon the face of said complaint that the same did not state facts sufficient to constitute a cause of action. The justice before whom the demurrer was argued, at special term, was of the opinion that the omission of the name of the obligees in the bond was not fatal to its validity, but might be cured by the condition and by parol evidence, if necessary to show who were intended by the trustees and their successors. That the omission of the approval of the sureties did not affect the validity of the bond; that provision being merely directory. That it did not appear from the complaint that the tax list delivered to the collector was for a new tax.

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It might have been for the old tax uncollected. If there had been no moneys collected for which that bond was given as security, such matters must be proved on the trial. He also held that the objection that no judgment could be recovered on the bond until after proceedings had been taken by warrant against the collector, could not be taken on demurrer. It need not be averred in the complaint. That that provision seemed to be directory to the supervisor to compel him to put the bond in suit, but did not prohibit the action on the bond, previously. Judgment was accordingly given for the plaintiff, on the demurrer, with leave to the defendants to answer, on payment of costs.

*Hoffman & Hopper*, for the appellants.

*Edw. Pye*, for the respondents.

*By the Court*, LOTT, P. J. The complaint in this action, after alleging that the plaintiffs are a corporation under the general act for the incorporation of villages, and that the defendant Philips was, in 1857, duly elected collector of the village, avers that he with the two other defendants as his sureties, for the purpose of renewing his warrant for the collection of taxes therein, executed and delivered to the said village a bond, of which a copy is set forth; that the said bond was approved by the trustees of the village at a subsequent meeting of the trustees, by a resolution entered in their minutes; that a tax list, with a warrant thereto attached, was thereupon issued to said Philips for the collection of the taxes of said village; that the warrant had expired, and that he had failed to execute his duty as such collector, by his neglect and refusal to pay over to the treasurer of the village the sum of \$286.76, collected by him prior to the expiration of said warrant, and that his sureties have been notified of his default. Upon these facts judgment is demanded for the said sum, with interest from the expiration of the warrant. A demurrer to this complaint was interposed, on the ground that the same

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does not contain facts sufficient to constitute a cause of action. The principal question presented for our decision arises on the form of the bond and its approval.

The act for the incorporation of villages (*Laws of 1847, ch. 426, § 61*) provides and requires that the collector of every village incorporated under it, before receiving any warrant for the collection of taxes, "shall execute to such village by its corporate name, and deliver to the trustees thereof, a bond with sufficient sureties, to be approved by them by a certificate of approval signed by them and indorsed thereon, conditioned for the faithful performance of his official duties; and if he shall neglect to execute and deliver to the trustees such bond, within three days after being notified by the president to do so, his office shall be vacant."

The bond in question is not *in terms* executed to the village by its corporate name. It, after naming the obligors, and describing them as inhabitants of the village of Warren, declares that they "are held and firmly bound in the penal sum of eight hundred dollars, to be paid to the trustees or their successors in office." It however, in the recital preceding the condition, states that Philips, one of the obligors, "has been chosen collector of said village of Warren," and then is conditioned for the faithful performance of his duties as such collector.

The instrument is very inartificially drawn, and discloses a want of proper attention on the part of the trustees to a material and responsible part of their duties. We are of opinion, however, that it is a substantial compliance with the provisions of law above set forth. It is a rule of construction, that the whole contract is to be considered, in determining the meaning of any or all of its parts. The condition of a bond may therefore be referred to for the purpose of explaining the obligatory part, and the recital in an instrument affords much light and aid in the interpretation of other parts thereof. (*2 Preston on Contracts, 14, &c.*)

By reference to the condition and recital of the instrument

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in question, there can be no doubt that it was intended by the parties to be a bond to the village. They show the inducement and reason for its execution to have been the fact that Philips was chosen the collector of the village of Warren, and that the object was to secure the faithful performance of his duties.

When, then, the obligors bind themselves in the penal sum of \$800, to be paid to *the trustees or their successors in office*, it is evident that the trustees of the village named were intended, and it operates as a bond to them, from the declaration that the sum, for the payment of which they are so bound, is to be paid to them.

It is true, nevertheless, that if the bond be as construed, it is not executed to "*the village by its corporate name.*" The trustees, however, were by the law to receive it. They represent the corporation, and it acts by and through them. They in their official capacity may indeed be said to be the corporation. The obligation was not intended to be to them as individuals. It is to "*the trustees or their successors in office,*" which is a clear indication that it was understood to be to them in their corporate character and capacity. It is not necessary, when a bond is required by law to be given by a public officer, that it shall conform in all respects to the form thereof prescribed by statute; but it is "*sufficient if it conform thereto substantially, and do not vary in any matter to the prejudice of the rights of the party to whom or for whose benefit such bond shall have been given.*" This is expressly declared by statute. (2 R. S. 556, § 33.)

Several adjudications have been made in relation to bonds of constables, showing what has been considered a substantial compliance with the law, in relation to the security required to be given by them, to which it may be useful to refer, for the purpose of determining whether the bond in question conforms substantially to the statute. It was required by 2 *Rev. Laws*, (p. 126,) that every constable, before entering on his duties, should execute an instrument in writing under his hand and

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seal, before the supervisor or town clerk, and to be approved by such officer, by which he and his sureties should jointly and severally agree to pay to each and every person such sum of money as he should become liable to pay on account of any execution that should be delivered to him for collection; and it was also provided that such approval should be indorsed on the instrument. In giving a construction to these provisions, it was held in *The People v. Holmes*, (2 Wend. 281, and 5 id. 191,) that a bond to "the people of the state of New York, in a penalty conditioned that the constable should pay to each and every person such sums of money as he should become liable for on account of any execution which should be delivered to him for collection," was a sufficient compliance therewith; while in *Dutton v. Kelsey*, (2 Wend. 615,) a simple agreement, without any penalty, to pay to any person who might be aggrieved by the constable's neglect of duty in paying over such money, was approved and sustained.

Subsequently, the case of *Skellinger v. Yendes* (12 Wend. 306) came up for consideration. The action was brought on an instrument bearing date 5th March, 1828, signed but not sealed by a constable and his sureties, which, after reciting the appointment of the constable, was in the following terms: "We the subscribers engage that all papers that shall come into his hands as a constable shall be well and faithfully executed by him, and that he shall collect and pay over all executions that are collectable, and that we will be accountable to all persons in whose favor any execution may come, for the damages in the same, if not paid over to him or them according to the statute in such case made and provided; and also we are accountable for all attachments and summonses, &c. appertaining to the said office of constable." The plaintiff was nonsuited, on the trial in the court below, upon the ground that the instrument was not a *valid instrument*, within the statute. This judgment was reversed, and Judge Savage, in his opinion, says, in answer to the objection that the instrument was not in the form contained in the statute: "It is

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sufficient that the substance is there;" and, after commenting on the several provisions, he concludes by saying, "the instrument is a valid agreement by the persons who executed it, in so far at least as execution creditors are concerned."

These cases fully justify the conclusion that the bond under consideration conforms substantially to the requirements of the statute so far as relates to the obligees therein; and as it is not denied but that it is, as to the form thereof, in all other respects sufficient, it must be held to be valid and obligatory on the parties, unless another objection taken thereto, now to be considered, is available.

The act provides for the delivery to the trustees of a "bond with sufficient sureties, to be approved by them by a certificate of approval signed by them and indorsed thereon." The only allegation in the complaint, in relation to the approval of the bond, is, that it was approved by the trustees at a meeting held by them subsequent to its delivery, by resolution entered in the minutes of said trustees; but it does not appear that they ever signed and indorsed any certificate of such approval on the bond. A similar certificate was directed to be indorsed on the bond required to be given by a constable, to which reference has been made; and it appears that the town clerk neglected to indorse his approval of the sureties, in the case of *Skellinger v. Yendes*, (*supra*.) It was there insisted that the omission invalidated the instrument; but the court say: "That provision was intended for the benefit of those who should put executions into the hands of the constable, and has no connection with the liability of the sureties. Their signature was all that was necessary to make them liable;" and adds, that "there is nothing in the language or the policy of the statute which makes void any such instrument executed for the security of execution creditors." So in this case, the bond was intended to secure the village against loss on account of the default of the collector, and to prevent him from proceeding to collect any tax until satisfactory security was given for the faithful performance of his duty; and to that end the

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trustees were, by section 57, subd. 13, authorized to fix the penalty, and decide upon the sufficiency of the sureties in such bond. As soon as a bond with sureties was accepted, it became a valid and obligatory instrument. The indorsement of a certificate showing the approval of the sureties was directory only to the trustees. It might afford evidence of the fact of approval, but its omission did not affect the instrument itself, or its validity.

Our conclusion therefore is, that the bond described in the complaint is sufficient, and obligatory on the parties.

It is insisted, however, that the allegations in the complaint are not sufficiently certain to show that the warrant referred to was for the collection of taxes returned as unpaid on a warrant previously issued; nor that the money alleged to have been collected and retained by him was part of the taxes specified in the list and warrant for which this bond was given; and if they are, yet that the plaintiffs have no authority to maintain an action for the collection of the moneys so collected, at least until the remedies given against a town collector for the non-payment of taxes for which they are liable or accountable have been exhausted.

The objection relating to the insufficiency of the allegations is not well founded in fact; but assuming it to be otherwise, it is not available on demurrer. The defendant's remedy was by motion, to make the complaint more definite and certain in that respect.

The other objection is equally untenable. Although no express authority is given, in the act under which the plaintiffs are incorporated, for the prosecution of suits for debts and other demands, yet there is no doubt of such authority under the general powers conferred on all corporations. The sections in that act, referred to by the appellants' counsel, relate to actions in particular cases only, and do not in any manner affect any other.

There is no ground for the position that no suit can be maintained on the bond until a warrant has been issued by

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the county treasurer, pursuant to the provision of 1 *R. S.* 400, § 13, for the collection of the unpaid tax out of the collector's individual property, and has been returned unsatisfied. That provision relates only to warrants issued to collectors of taxes by the board of supervisors, and does not apply to collectors of city or village taxes, except in special cases where it is made applicable.

The judge at special term therefore decided correctly in overruling the demurrer; and the judgment rendered must be affirmed, with costs.

[KINGS GENERAL TERM, February 18, 1860. *Lott, Emott and Brown*, Justices.]

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PECK vs. HILER.

A judgment will not be set aside, and a new trial granted, on the grounds of *surprise* or *newly discovered evidence*, where the party has been guilty of laches, in making his motion; where the new evidence would be cumulative in its nature; or after judgment has been entered.

And though the plaintiff's evidence be a surprise upon the defendant, yet the defendant may, by his own conduct, preclude himself from all relief on that ground.

Thus, where the defendant, though present at the trial, instead of asking for a postponement on the ground that the plaintiff's evidence was a surprise upon him, examined a witness on the subject testified to by the plaintiff's witnesses, and sought to show by him that the facts to which they had sworn were not true; and at the close of the testimony, agreed that the written points of both parties should be submitted for the consideration of the court, without any suggestion of surprise, or any request that the decision should not be made on the case as it stood; and in consequence of his omission to furnish his points, nearly seven months elapsed before the decision of the judge was made; several motion terms in the mean time having been held, at which an application could have been made by him to open the case; instead of doing which, he permitted the court to examine and decide upon the evidence adduced, without any interference or complaint on his part; and gave no intimation of having been surprised by the plaintiff's evidence, until three months after the decision of the court was made;

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it was held that the defendant, by his conduct, must be presumed to have been willing to abide by the decision of the court on the questions of fact presented for its determination; and that he could not repudiate and reject that decision after it was found to be adverse to him.

**A**PPEAL by the defendant from an order made at a special term, denying a motion for a new trial, on a case and affidavits, on the grounds of surprise and newly discovered evidence. The material facts will be found in the opinion of the court. The action has been twice tried. On the first trial the plaintiff recovered a judgment, which, upon a case made, was set aside, and a new trial ordered. (*See 24 Barb. 119, S. C.*)

*Calvin Frost*, for the plaintiff.

*William Tracy*, for the defendant.

*By the Court*, LOTT, P. J. This case was tried before one of the justices of this court, without a jury, on the 25th day of October, 1858. On the trial it became a material inquiry whether the acts of the plaintiff in the tearing up and removal of some rails from a rail road, claimed by the defendant to form a part of certain premises demised to him by the plaintiff, constituted a partial eviction. The plaintiff, to avoid the effect of those acts, introduced evidence tending to show that the road had become useless, and that the defendant himself had previously taken up and removed a portion of the rails therefrom, and thus contributed to make it impassable. Although the defendant objected to the introduction of that evidence as inadmissible within the issues, he did not profess to be surprised thereby, but produced and examined his overseer and managing agent, to prove that such removal had not been made by him or his servants. After the testimony was closed on both sides, it was agreed between the counsel for the respective parties that written points should be submitted to the court. That arrangement was, however, not carried out till March or April, 1859. A decision by the justice was con-

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sequently delayed and was not made till in May thereafter, when he decided in favor of the plaintiff. Judgment on that decision was, after a previous notice of taxation duly given, entered on the 30th day of that month. In June the defendant, on an affidavit that he was taking measures to move for a new trial, upon the ground of newly discovered evidence, obtained an extension of time to make a case and prepare affidavits for that purpose. A case was accordingly made, which was settled on or about the 10th day of July, 1859; and on the 19th of August a notice was given by the defendant's attorney that he would, on such case and on affidavits served therewith, move the court, at a special term to be held in September, that the judgment be set aside, and a new trial ordered, *on the ground of surprise*, and on the further ground of newly discovered evidence. That motion was made before the justice who tried the case, and after consideration was denied by him, on the following grounds: 1. Because the new evidence would be cumulative in its nature; 2. Because the defendant had been guilty of laches in making his motion; and 3. Because the motion was too late after judgment had been entered. An order on that decision was entered, and the case now comes before us for review on appeal.

After a careful examination we are of opinion that the order must be affirmed. The motion concedes that the evidence introduced by the plaintiff was material to the issue, because it is in this view only that it can be important for the defendant to avail himself of the evidence he now seeks to adduce for the purpose of contradicting it.

The question then arises, whether he was excusable in not introducing it on the trial. It is a well settled rule, that a party is bound and presumed to know the general leading points which will be litigated in his case, and that he must procure all the evidence, which, with ordinary diligence, he might have procured, in relation to those points.

The reply to the matter pleaded as an eviction makes no allusion to the removal of the rails by the plaintiff, but alleges

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that the road was out of repair and entirely unfit for use at the time of the demise, and so remained and continued until the removal of the rails by the plaintiff—being the acts set up as an eviction—and then avers that the defendant, after said removal, and with full knowledge thereof, paid to the plaintiff the rent that had subsequently accrued. These allegations, in our opinion, warranted the defendant in the conclusion that no other affirmative acts than those specified would be relied on in avoidance of the defendant's answer. He was therefore not chargeable with a want of due diligence in not being prepared to produce the testimony he now seeks to introduce for the purpose of showing that no rails were in fact removed by the defendant; and the plaintiff's evidence charging him with such removal was calculated to operate as a surprise on him, although it is fairly inferable that it did not, and that his surprise resulted from the adverse decision. But assuming it to be otherwise, he has precluded himself from all relief on that ground. He was personally present at the trial, and instead of asking for a postponement, he examined his overseer in relation to the subject, and sought to show by him that the facts to which the plaintiff's witnesses had testified were not true in fact. Nor is that all. After the testimony was closed, it was agreed, as already stated, that the written points should be submitted for the consideration of the court, without any suggestion of surprise, or any request that the decision should not be made on the case as it stood. Nearly seven months elapsed, in consequence of the omission to furnish such points, before the decision of the judge was in fact made. Several motion terms in the mean time elapsed. At any of these an application could have been made by the defendant to open the case. Instead of doing this, he permits the court to examine and decide upon the evidence adduced, without any interference or complaint, and even after the decision is made, no intimation of any surprise is given until some three months afterwards. By this course of conduct he must be presumed to have been willing to abide by the decision

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of the court on the questions of fact presented for its determination; and it would be unreasonable, not to say unjust, while he could have availed himself of the benefit of that determination, if it had been favorable to him, to extend to him the right to repudiate and reject it after it is found to be adverse. Having taken this course, he cannot invoke the aid of the court to relieve him.

These views dispose of the application as far as it is founded on surprise. It then remains to be considered whether any relief can be given, on the ground of newly discovered evidence. It is a settled principle, applicable to such motions, that if the newly discovered evidence consists merely of additional facts and circumstances going to establish the same points which were principally controverted before, or of additional witnesses to the same facts and circumstances, such evidence is cumulative, and a new trial should not be granted. (*The People v. Superior Court of New York*, 5 *Wend.* 127.) Applying this principle to the case under consideration, the motion was properly denied. The fact in controversy was whether the defendant had removed any rails before the acts of the plaintiff charged as an eviction, which are conceded to have been done in April, 1853. The evidence of the plaintiff on that point, was the testimony of two persons swearing to the fact of such removal on two different occasions in 1852, by workmen of the defendant under the charge of his overseer. One of them speaks as to one time and locality, and the other as to another time and place. The overseer was examined and sworn, and he testified on that subject as follows: "There never was any rail removed from the road by the defendant's men, to my knowledge. I was removing the earth from the rail road at the red bank, (which was one of the localities designated by the plaintiff's witnesses *above* the chemical works,) to get at the road. I was examining the state of the road with a view of repairing it at that time, and did not take up any of the rails from the rail road *below* the chemical works, (the other locality referred to,) before July, 1854."

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The testimony claimed to be newly discovered, as disclosed by the affidavits of some twenty-six different individuals, with the exceptions which will hereafter be noticed, is general, of persons employed by the defendant about his mill and premises, but not at the localities referred to, and of other individuals acquainted with the road, who frequently passed over it, and say they did not discover that any rails were removed. This does not negative or disprove the fact alleged by the plaintiff's witnesses, and which I may say is confirmed by the affidavits of four other persons produced in opposition to the motion, but is corroborative merely of the overseer's testimony. The exceptions referred to are the declarations of Edward C. Remer, who was the overseer, and of John Cordon, Thomas F. Murphy, Hiram Shay and William Mulhall. The overseer, in his affidavit, swears that the statement of the plaintiff's witnesses in relation to the point in issue "is untrue, to this deponent's knowledge; that no part of said rail road, either above or below the chemical works, was taken up by this deponent, or by any one in the employ of said Hiler, (the defendant,) in the charge of this deponent, by deponent's direction;" and then, after speaking of some other matters, concludes by saying, "that when this deponent was examined as a witness on the trial of said action, no questions were put to him tending to elicit from him testimony of the facts above stated, or this deponent would have testified to what is contained in the foregoing affidavit." This witness certainly has for some cause felt himself justified to swear more strongly in making his affidavit than he did on the trial, and some cause has doubtless had an influence "to elicit from him testimony" tending, if possible, to give additional weight to what he had previously testified; but the evidence was strictly cumulative as bearing on the main fact, and it is difficult to discover why, when testifying in relation to the same subject matter on the trial, he did not speak as positively then as he was afterwards enabled to do. The reason assigned is by no means satisfactory.

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John Cordon, after stating that he was in the employment of the defendant from May 1, 1852, to January, 1854, and worked with Remer on the railway at the red bank spoken of by one of the plaintiff's witnesses, and also below the chemical works, says, "that during that time none of the rails connected with the said railway, or forming part thereof, were removed or taken up by this deponent, or by any other person in the employ of the defendant;" but immediately adds, "*that during the summer of 1852 deponent discontinued working at the said railway, and commenced working in the mill of the defendant;*" and he then says, "that he occasionally traveled along said railway, and that said railway was in the same condition as it was in May, 1852, until some time in the spring of 1853."

This, while it shows that he was during a portion of the year 1852 employed at the localities referred to by the plaintiff's witnesses, it fails to show that he was so employed at the times designated by them; on the contrary, it appears clearly from his statement that he was not so employed on the last occasions specified, and the fair conclusion is also that he was not at the first.

Thomas F. Murphy speaks of being employed as a carman under Remer, in carting machinery and sand in the neighborhood of the railway, in the months of April, May and June, 1852; that such work was completed in the month of June, and that all the men engaged therein under Remer, together with Remer himself, withdrew therefrom as early as June, 1852; and he adds, that when the men left, no rails had been taken up or removed. Hiram Shay swears to the same facts substantially, and to the additional fact, that after the completion of the job he examined the railway both above and below the chemical works, and no portion thereof had up to that time been removed or taken up. William Mulhall swears that he worked under Remer, in the employ of the defendant, from 1st May, 1852, to about the middle of December in the same year; that "during a portion of said time he was work-

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ing on the railway" assisting in taking machinery and other articles from the rail road to the mill; "that during that time none of said rails were removed or taken up by this deponent, or by any one in defendant's employ;" and that after he got through with the work on the railway, he went to the mill of the defendant to work. This, although showing that the witness was employed a part of the year on the railway, does not disclose what particular time or portion of the year.

It also appears by the affidavit of Shay, that there were many others employed upon the same work with him, and yet the affidavits of the other persons employed are not produced by the defendant.

If therefore it be conceded that the persons whose testimony is above in part given testify to the truth, and that the statements of the other parties are also true, yet their testimony is not of a different kind or character from that of Remer adduced on the trial. Its tendency and effect are merely to give additional weight to the facts sworn to by him, and to "reinforce the presumption" raised by his evidence, that the plaintiff's witnesses either were mistaken or swore falsely. It can therefore only be regarded as cumulative, and cannot be considered as establishing a new or distinct fact. It is consequently insufficient to warrant a new trial. (*The People v. The Superior Court*, 5 Wend. 127, *supra*, S. C. 10 *id.* 285 and the cases cited. *Gyot v. Butts*, 4 *id.* 579. *Fleming v. Hollenback*, 7 Barb. 271.)

These views are sufficient to dispose of the defendant's appeal. It may be proper, however, to add, that if we entertained a different opinion on the questions already considered, the motion was properly denied, on the ground that the application was too late after judgment entered. The decision in that respect was in accordance with the practice since the adoption of the code, as established by the general term in this district, in the case of *Harrison v. Lott* (not reported.) Such also was the well settled rule before the code, except so

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far as it was modified by the act of 1832 relating to the supreme and circuit courts; (*chap. 128 of Laws of 1832; see Rapelye v. Prince, 4 Hill, 119, 125;*) but that act related to personal actions only. It therefore, even if still in force, could not be of any avail to the defendant in this action.

In any view of the case, the order made at special term was right, and must be affirmed with \$10 costs.

[KINGS GENERAL TERM, February 13, 1860. *Lott, Emott and Brown, Justices.*]

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 BARNES vs. ALLEN.

In an action for maliciously enticing and carrying away the plaintiff's wife from his house, evidence of a general report that the plaintiff ill treated his wife, is inadmissible by way of justification.

Nor will the mere statements of the plaintiff's wife, that she was abused by her husband, without any proof of such abuse, in fact, be a justification for the defendant's advice to her to leave her husband, and for his agency in removing her from her husband's house to that of her father.

To justify his interference in removing the wife from her husband's house, the defendant is bound to show that she was abused. Her statement that she was abused is not sufficient.

Whenever a wife is not justifiable in abandoning her husband, he who knowingly and intentionally assists her in thus violating her duty, is guilty of a wrong, for which an action will lie.

That which will excuse a man for harboring the wife of another, will not excuse an act of interference in the husband's affairs, either in advising her to leave her husband's premises, or in carrying her away.

Where the confessions of the defendant are given in evidence, to show his agency in a particular transaction, it is proper to instruct the jury that they may believe a part and reject another part of the allegations made by the defendant; that they may believe the fact which he admitted, and disbelieve the reasons assigned for it.

**T**HIS was an appeal, by the defendant, from a judgment entered at a special term, after a trial at the circuit. The action was brought to recover damages of the defendant for counseling and attempting to induce the plaintiff's wife to

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leave him; and for taking and carrying her away from the plaintiff's house, and breaking up his family. The defendant, by his answer, denied the allegations of the complaint; and for a further defense, alleged that immediately prior to the time the plaintiff's wife left his residence, the plaintiff was guilty of cruel and inhuman treatment of his said wife, and that it was not safe for her to live with him, and that the plaintiff's said wife left the plaintiff's residence on account of such ill treatment, as she lawfully might for the cause aforesaid, and at her request the defendant carried her to her father's residence. That such cruel and inhuman treatment of the plaintiff's wife by her husband had been continued from the marriage of the plaintiff and his wife to the time said wife so left the plaintiff's residence. That the plaintiff consented to, requested and directed his said wife to leave his residence, and go home to her father's, and not come back; and that she did so, and the defendant conveyed her, at her request, to her said father's. That it was generally reported and believed that the plaintiff ill treated, beat and abused his said wife, and that the plaintiff's mind was weak, and his temper insane; that it was unsafe and dangerous for the plaintiff's wife to live with him, and that in consequence thereof, when the plaintiff's wife applied to the defendant to convey her to her father's house, which she did, he (the defendant) consented so to convey her; the defendant being a near neighbor of the plaintiff.

On the trial Charles Brown, a witness for the plaintiff, testified as follows: "I live in Pleasant Valley, and know the parties; they live between 60 and 80 rods apart, with a creek between them. I had a conversation with the defendant in March, 1857; it was after the plaintiff's wife went away; it was the next day after; he said he had carried her away; I think the defendant said he had advised her to go away; I never heard the defendant say he was unfriendly to the plaintiff; the defendant had got a warrant for the plaintiff. Allen said in the same conversation that he carried her away because Barnes abused her; that Barnes' wife had told him (defendant)

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that her husband so abused her that she was afraid of her life, and she requested him (defendant) to carry her to her father's, Jonathan Lockwood, which he did; the defendant said that he gave her the advice to go to her father's, because she said that she was afraid of her life at her husband's.

Samuel Anthony, another witness, testified: "I lived at Thomas Allen's at this time; I recollect the circumstance of the plaintiff's wife leaving; I was at that time working for the defendant, Allen; Allen came to me and told me to harness his horses; he told me to do it quick; I did so; he then told me to get into the wagon with him; I did so, and we drove to the plaintiff's; plaintiff was down in the lot; Allen didn't say any thing in passing; he (Allen) kept looking south towards where Barnes was at work in the meadow; the horses walked up hill and trotted down; we stopped at the horse-block in front of plaintiff's house; plaintiff's wife and little boy came out of the house and got into the wagon; Allen told me to notice that he did not touch plaintiff's wife; Allen and Barnes were not very good friends; Allen said he wished he had better neighbors; when we stopped at plaintiff's house, his wife came immediately out, and getting into the wagon, they (the defendant, plaintiff's wife and little boy) started immediately; the horses started on a trot; plaintiff's boy was five or six years old; he (Allen) said he would be even with him (Barnes;) defendant said he would like to sell plaintiff out; defendant, with plaintiff's wife, went over the hill; defendant's wagon could be seen for a little ways from where Barnes was; I could not see the way they took; it was after breakfast in the morning that this took place; they did not take the usual road to Pleasant Valley and Mr. Lockwood's; Barnes could only see them a little way on the road they took; he could see them from the lower road."

Benjamin Howell testified: "I know the parties to this action; last summer I had a conversation with defendant, in which he told me that he had advised plaintiff's wife to leave him; he did not say whether plaintiff was present at that time

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or not; defendant said that Mr. Barnes and he were on bad terms, and had been before he took away his wife; defendant said plaintiff was a bad man; defendant said he would hunt plaintiff as long as he lived; defendant said that by taking away plaintiff's wife he guessed he was even with him; defendant said that he and plaintiff had always been on bad terms, and that he would hunt him to his grave. Defendant did not say why he gave this advice; this conversation was in Elias Doty's meadow; no one was present but us two; we were talking about this transaction; I don't remember who introduced it; I have not talked with plaintiff or defendant of it before nor since; defendant said plaintiff was a bad man, and it was dangerous for his wife to live with him; I never knew until within a few days ago that this suit was pending; I never told any one, before this examination, what I would swear to."

Harris Marshall testified as follows: "I know the parties to this action; I recollect of hearing defendant speak of going away with plaintiff's wife; it was within a week of that occurrence; I didn't hear all that defendant said; I heard defendant say he carried her (plaintiff's wife) off; he said he had advised her to go; I asked defendant if plaintiff was present when he advised his wife to leave him; he said he was not, and that he didn't know where he was; defendant and plaintiff were on bad terms." Question by defendant's counsel: "Was it not generally reported that plaintiff ill treated his wife?" Objected to by plaintiff, and excluded by the court, to which decision defendant excepted. "Defendant said that plaintiff's wife came to his (defendant's) house at night, and said that she was afraid to stay at plaintiff's house, and wanted to stay with him (defendant;) defendant said that he told her to go home and fasten her door, and if any thing happened in the night, to place a candle at a certain window; defendant said that he sat up all night, and watched that window; defendant said that plaintiff's wife told him that she was afraid to stay at plaintiff's house at night; defendant said plaintiff's wife claimed his protection." It was admitted that plaintiff

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was married. The testimony here closed, and the defendant moved for a nonsuit, upon the grounds that the facts proved made out no cause of action, and that there was no proof of malicious intent. The circuit judge overruled the motion; to which decision the defendant's counsel excepted. The circuit judge charged the jury, among other things, as follows: That what would excuse a man for harboring a wife will not excuse an act of interference in the husband's affairs, either in advising her to leave her husband's premises or in carrying her away. To which direction the defendant's counsel excepted. The justice further charged, that to sustain the first count of the complaint, the plaintiff must show that his wife left him in consequence of the defendant's advice or persuasion. That as to the second count, the fact of her going away in the defendant's wagon was proved. If she met him casually, he would have been justified by her complaints, if she made them, in taking her in his wagon and carrying her to her father. If he went there by appointment, to carry her away, then the removal must be justified by facts. (Excepted to by defendant.) That the plaintiff had given other evidence of the removal of his wife by defendant, to wit, confession of the defendant of the act, and of his reasons and motives. That so far as these confessions consisted of statements that the plaintiff's wife had told him (the defendant) that she was abused, that, if true, would not justify the defendant in interfering to remove her. He must show that she was abused, to justify such an interference. (Exception to this.) That if the defendant in these conversations stated that the plaintiff's wife was abused and ill treated, as a fact, and not merely that she complained to him, so far the jury had a right to consider the defendant's statements as material on this part of the case. But that they had a right to believe a part and reject others of those allegations thus made in these conversations by the defendant. (Exception to this.) That they might believe the fact that he admitted, and disbelieve the reason which he gave. (Exception to this.) That if they rejected all the defendant's explanations of his conduct, and believed that he interfered

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purposely to remove plaintiff's wife from her husband, the action was made out. (Exception.)

The jury found a verdict in favor of the plaintiff, for \$800.

*J. Barnard*, for the appellant.

*C. Wheaton*, for the respondent.

*By the Court*, LOTT, P. J. The evidence offered by the defendant, of a general report that the plaintiff ill treated his wife, was clearly inadmissible; and as the exception is not noticed in the points of his counsel on this appeal, we assume it to be abandoned. Nor are we able to discover any principle on which the mere statements of the plaintiff's wife that she was abused by him, without any proof of such abuse in fact, can be a justification for the defendant's advice to her to leave him, and for his agency in removing her from the house of her husband to that of her father. The husband is entitled to the assistance and society of his wife, and she is not justified in leaving him without cause shown.

Charges or allegations merely that such cause exists are not sufficient; and if they will not justify her in violating her obligations, she cannot, by representing to others that cause exists, by which they encourage, advise and assist her in such violation, extend immunity to them for their acts. On the contrary, whenever a wife is unjustifiable in abandoning her husband, he who knowingly and intentionally assists her in thus violating her duty, is guilty of a wrong for which an action will lie. (*Schuneman v. Palmer*, 4 Barb. 225, &c.) There was no error therefore in the circuit judge, in instructing the jury that the defendant was bound to show that the plaintiff's wife was abused, to justify his interference in removing her, and that her statement that she was abused was not sufficient.

Nor is there any objection to the remark, "that what would excuse a man for harboring a wife, will not excuse an act of interference in the husband's affairs, either in advising her to leave her husband's premises or in carrying her away." In one case, the act is one of protection against an abuse and

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violation of marital rights; in the other, an aggression on those rights. It is therefore consistent with the principles of justice, that the law should excuse the former, while it demands a justification of the latter. This distinction was recognized in the case of *Hutcheson v. Peck*, (5 *John. Rep.* 196,) and must, in our opinion, be sustained. At all events, there is not enough disclosed in the case to warrant us in saying that the remark as made was not correct.

Another question remains to be noticed. It appears that the confessions of the defendant were given in evidence to show his agency in the transaction; and the judge, in speaking of those confessions, instructed the jury that they might believe a part and reject others of the allegations made by him; that they might believe the fact that he admitted, and disbelieve the reasons assigned for it. This rule appears to be fully sustained by Mr. *Greenleaf* in his valuable treatise on *Evidence*. He says: "Although the whole of what is said at the same time and relating to the same subject must be given in evidence, yet it does not follow that all the parts of the statement are to be regarded as equally worthy of credit; but it is for the jury to consider, under all the circumstances, how much of the whole statement they deem worthy of belief, including as well the facts asserted by the party in his own favor as those making against him." And subsequently, in speaking of confessions by a prisoner, he further says: "If, after the whole statement of the prisoner is given in evidence, the prosecutor can contradict any part of it, he is at liberty to do so, and then the whole testimony is left to the jury for their consideration, precisely as in other cases where one part of the evidence is contradictory to another. For it is not to be supposed that all the parts of the confessions are entitled to equal credit. The jury may believe that which charges the prisoner and reject that which is in his favor, if there are sufficient grounds for so doing. If what he said in his own favor is not contradicted by the evidence offered by the prosecutor, nor improbable in itself, it will naturally be believed by the jury; but they are not bound to give weight to it on that account, but

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are at liberty to judge of it, like other evidence, by all the circumstances of the case." (1 *Greenl. Ev.* §§ 201, 218, 3d ed.)

Several authorities are cited sustaining these doctrines. I will only refer to the case of *Kelsey v. Bush & Viele*, (2 *Hill*, 440,) where Judge Bronson, in discussing the effect of confessions, says: "The court and jury are not always bound to give equal weight and importance to every part of the admission. If that part of the confession which discharges the party is in itself highly improbable, or if there be evidence *aliunde*, although but slight, tending to discredit it, the jury may believe one part of the confession and reject the other."

The authorities cited by the defendant's counsel on this question, all of which are referred to by the learned judge in his opinion, were cases where there was nothing improbable or suspicious in that part of the confession which went to discharge the defendant; and all the other evidence in the case tended to confirm the truth, and do not conflict with the rule laid down by him, nor with that in the case at bar.

The evidence not only established the fact, that the plaintiff's wife left his house by the advice and agency of the defendant, but also tended to show that he, in such advice and agency, instead of being governed by the reasons assigned by him, was actuated by malice, and that his object was to be revenged for some previous act of the plaintiff. Upon such evidence, the jury were warranted in rejecting the excuse and explanations given by the defendant for his conduct; and the court decided correctly in denying the motion for a nonsuit, and properly instructed the jury, that if they rejected those explanations, and believed that he interfered purposely to remove the plaintiff's wife from her husband, the action would lie.

Our conclusion upon the whole case is, that none of the defendant's exceptions are well taken. The judgment must therefore be affirmed, with costs.

[KINGS GENERAL TERM, February 18, 1860. *Loft, Emmet and Brown*, Justices.]

# INDEX.

## A

### ACTION.

1. In all cases where a party, having it in his power, cancels a contract or declares it void, he should restore the other party to his former right, by repayment of money, or return of property, received on such contract; and failing to do so, he is liable to an action for its recovery.  
*Utter v. Stuart*, 20
2. A complaint alleged that the plaintiff, being the owner of a farm, sold and conveyed it to the defendant, who, in consideration thereof, promised and agreed to pay the plaintiff \$2700 therefor. That the defendant paid \$200, and gave the plaintiff a mortgage on the premises to secure the payment of \$2500, the remainder of the purchase money; that no bond was given as collateral to the mortgage, but the defendant agreed not to commit waste on the premises, by cutting timber or otherwise, and that the farm should be kept and preserved in as good condition as it was at the time of sale; that to induce the plaintiff to waive the giving of a bond by the defendant, the latter falsely and fraudulently represented that he purchased the farm for a homestead for his son; whereas, in truth and in fact, he purchased the same for the purpose of selling it at an advance, to one D. who was without means and unable to purchase such a farm. That the defendant, two days after he had so purchased the farm, sold and conveyed it to D. without any covenant or agreement from him restraining the commission of waste, or obliging D. to keep the premises in good condition and preserved from waste and depreciation in value. That the defendant suffered and permitted D. to cut and destroy the timber on said farm, and the fences, farm and buildings to become ruined, dilapidated and greatly depreciated in value, to the amount of \$800. That the mortgage had been foreclosed, and the farm was sold for a sum insufficient to pay the same; the deficiency being over \$800. The complaint then prayed that the defendant might be adjudged to pay to the plaintiff the amount of such deficiency, with interest, &c. *Held* that the complaint did not state facts sufficient to constitute a cause of action; and that it was properly dismissed for that cause. *Vrooman v. Dunlap*, 202
3. A right of action for the conversion of promissory notes will pass to the assignees of the owner, under a general assignment executed by him, of all his property, for the benefit of creditors. *Whittaker v. Merrill*, 889
4. But where the assignees count only upon a conversion subsequent to the assignment, as shown by the refusal of the defendants to deliver the notes, on a demand made in their behalf, and they give evidence tending to sustain that claim, it is not competent for them afterwards to avail themselves of the original right of action, so assigned to them, for a conversion previous to the assignment. 89

5. The objection, in such a case, is not one of variance between the proof and the pleading, but is an objection to proving and recovering upon another and entirely distinct cause of action from that alleged in the complaint. 26

*See CORPORATION, 1 to 6.*

*DEATH BY WRONGFUL ACT, &c.*

### ADVERSE POSSESSION.

*See ANSWER.*

### AGREEMENT.

1. In all cases where a party, having it in his power, cancels a contract, or declares it void, he should restore the other party to his former right, by repayment of money, or return of property, received on such contract; and failing to do so, he is liable to an action for its recovery. *Utter v. Stuart*, 20
2. Prior to June 28, 1855, the plaintiff and defendants were partners, in the business of manufacturing machines, at Corning, in this state. On that day they agreed to dissolve the partnership; the defendants to give up to the plaintiff certain notes held by the former against him, for \$8000, and to give him a shingle machine, and also to construct for him an engine and bill of machinery, which the plaintiff was to set up and run until, from one half the net earnings thereof, to be received by the defendants, they were fully paid for such machinery, less the sum of \$300, which was to be deducted from the price. The defendants manufactured the engine and machinery, but on demand by the plaintiff, refused to deliver the same, on the ground that the plaintiff had purchased a lot of land in Pennsylvania, on which he proposed to erect the said machinery; that for the purchase money thereof, \$1541, he had confessed judgments which had been duly docketed, so as to become liens upon the land; that by the law of Pennsylvania the erection of this machinery upon the premises would make such machinery a part of the realty, so that the judgments would attach to the same as liens, and a sale of the land would pass the title to such machinery to the purchaser. *Held*, 1. That the plaintiff could not recover of the defendants for the price of the shingle machine, in the absence of any proof of a previous demand and refusal of delivery. 2. That in respect to the engine and machinery, if the law of Pennsylvania were as claimed by the defendants, the plaintiff had no right to require the delivery of that property in order that he might turn it over to pay, or secure, a precedent debt, in fraud of the defendants' claim for the purchase money. 3. That the defendants being, by the express terms of the contract, authorized to retain the title to the machinery until the purchase money was paid, they were not bound to relinquish their title to the property, or to allow the property to be sent out of the state, whereby they would be deprived of the same, or their lien upon it. 4. That evidence to show that the law of Pennsylvania was as claimed by the defendants, was admissible, and ought to have been received. *JOHNSON, J. dissented. Hawkins v. Brown*, 206
3. The law will not allow a party, in an action for the breach of a contract, to recover, as damages, losses which he has sustained in the performance of his contracts with others, even where such contracts are founded, in some measure, upon the contract alleged to have been broken. *Lowenstein v. Chappell*, 241
4. On the 20th of February, 1857, the defendant agreed to rent to the plaintiff a store, for the term of one year from the 1st of April then next. Relying upon this agreement, the plaintiff sold to M. the lease of a store he then occupied, agreeing to give possession on the 2d or 3d of April; and M. suffered the plaintiff to occupy a room in the store, for his goods, in the mean time. For the purpose of protecting his goods from damage while the store was undergoing repairs, the plaintiff packed them up, and they sustained some damage in consequence of the packing. In an action to recover damages of the defendant, for a breach of his agreement; *Held* that the packing of the goods not having been done for the purpose of remov-

- ing them to the store of the defendant, nor being necessary, for that purpose, the plaintiff could not recover for any injury to the goods occasioned by the packing thereof; such injury not flowing directly, or necessarily, from the breach by the defendant, but from the plaintiff's agreement with M. to give up to him the store in which the goods were situated, and that they should in the mean time occupy a particular space therein. *ib*
6. *Held* also, that the plaintiff was not entitled to recover *interest* on the value of his entire stock of goods which he intended to put into the defendant's store, during the time he was by the defendant's breach of contract prevented from exposing them for sale. *ib*
6. The plaintiff, and S., his assignor, being in possession of a bill of exchange, valid in their hands, for \$913.50, drawn by one T., their debtor, to the order of, and indorsed by, two other persons, on the defendant, payable in three months, delivered the same to the defendant on his promise to pay them therefor the sum of \$850, the next morning. *Held* that there was a good consideration to uphold the promise; the parting with the bill, under the circumstances, being a detriment to the holders, whether it was then accepted or not, and the receipt of it by the defendant being a legal benefit and advantage to him. *Forward v. Harris*, 338
7. S., the maker of a note, and the plaintiff and W. his sureties, being sued thereon, the plaintiff, before judgment, paid to the holder one half of the amount due on the note, and costs. The holder thereupon, by a written agreement acknowledging that he had received from the plaintiff \$45 in full for his share of the note, as one of the sureties, discharged him from all further liability thereon, and agreed to use due care and diligence in the collection of the note and costs out of S.; and when collected to pay the plaintiff one half of all he should be able to collect on the note. *Held*, that the payment, by the plaintiff, of a part of the costs of the action on the note, being a payment of what he was not, at the time, under a legal obligation to pay, formed an ample consideration for the agreement of the defendant. And this, whether the action had been previously discontinued or not. *Warfield v. Watkins*, 395
8. In such a case, the holder, having agreed to make the effort to collect the note of the principal, is bound to do so, by resorting to legal proceedings, if necessary. *ib*
9. And in an action against him, upon his agreement, it will not be a valid defense for the holder, that the principal might, by reason of the payment to such holder, by the plaintiff, of one half of the note and costs, and by the other surety, subsequent to the agreement, of the other half of the debt, have successfully defended an action against him on the note. For *non constat* that the principal would, if sued, have availed himself of the payments by the sureties, or have been able to establish that his liability on the note was discharged. *ib*
10. There is no such impossibility of performance, in such a case, on the ground of the principal having been discharged by the payment of the note, as will relieve the holder from the obligation of his contract. *ib*
11. Costs do not become a debt against a party to an action, until judgment; unless he agrees to pay them. *ib*
12. The plaintiff, by a written agreement executed on the 9th of October, 1849, agreed to do the mason work, and furnish the materials for erecting a building for the defendant, which was to be completed, except a portion of the plastering, on or before the 20th of November then next; which time was subsequently extended ten days. The building was to be three stories in height; the defendant reserving the right to put on a fourth story, by paying a specified sum per thousand for the brick laid in the walls. *Held* that the defendant's right of election, in regard to the fourth story, could only be exercised while a reasonable time remained for adding another story and finishing the work, with the addition, by the time

specified in the contract, or as extended; and that unless the defendant exercised his right of election within that time, he lost it. *Lauer v. Brown*, 416

13. *Held also*, that if, within that time, the defendant elected to have a 4th story, the plaintiff was bound to construct it, and perform all the work (except the plastering) by the 30th of November. That the time for completing the job was fixed in reference to all the work, including the fourth story, if that should be determined on. *ib*

*See FRAUDS, STATUTE OF.*

### ALIENS.

*See COUNTY COURTS.*

### ANSWER.

1. An answer, in an action to recover the possession of real estate, which denies that the defendant is in possession of the premises described in the complaint, or that there has been any demand of the possession, by the plaintiff, or any unlawful withholding thereof, does not put in issue the title of the plaintiff, or raise the question of adverse possession. *Ford v. Sampson*, 183
2. If the defendant designs to question the validity and force of the deed, under which the plaintiff claims, to pass the title to the lands in dispute while a stranger was in possession claiming title, he should frame his answer accordingly, and set up a title in himself, or title out of the plaintiff. *ib*

### APPLICATION OF PAYMENTS.

1. On the 16th of February, 1857, C. made and delivered to King a bond and mortgage to secure him for all sums of money he might become liable to pay by reason of indorsements he might make for C., to an amount not exceeding \$10,000. The mortgage was not recorded until Sept. 2, 1857. On the 25th of July, 1857, C. made his note for \$2000, payable two months from date, to the order of, and indorsed by Kelsey, which was afterwards indorsed

by King, for the accommodation of C. On the 22d of August, 1857, C. made another note for \$2000, at sixty days, payable to the order of S., which was indorsed by Kelsey, and afterwards by King, for the accommodation of C. Judgment was recovered upon both these notes, and collected of King. On the 10th of August, 1857, King made his own note, for \$2000, procured it to be discounted, and loaned the money to C., and on the 10th of August C. gave his note, indorsed by Kelsey, to King, for this \$2000, payable in two months. On this note Kelsey was not charged as indorser. On the 24th of September, 1857, a judgment by confession, in favor of King, against C., for \$6000, to secure the payment of the said three notes of July 25th, and August 10th and 22d, was docketed and filed. An execution was issued upon this judgment, on which \$2847.52 was collected, which was paid over to King, on account of the \$2000 which he had raised by the discounting of his own note, and loaned to C. on the 10th of August, 1857. This money was so applied in pursuance of parol directions given to the attorney, by C., at the time of issuing the execution. *Held*, 1. That the directions given by C. in respect to the application of the moneys collected upon the execution, were in strict accordance with the rules, both of law and equity. And that, independent of any direction or agreement, the law would apply that money first to the payment and satisfaction of C.'s debt to King, for the money loaned; that being a fixed liability, at the date of the judgment, while the liability created by the indorsements was only contingent; and the latter claims being secured by the mortgage, while the former was not. 2. That the referee erred, in first applying the \$2847.52, collected on the execution, to the satisfaction of King's liability on the indorsed notes. That he should have first satisfied the debt for money loaned to C. on the 10th of August, 1857, and applied the balance to the liability of King on the indorsements. 3. That the mortgage in question had priority, as a lien and claim, over the judgments entered by confession, in favor of King. *Thomas v. Kelsey*, 268

ARBITRATION AND AWARD.

See COUNTER-CLAIM.

ARREST.

1. In an action brought to recover the possession of real property, and damages for the unlawful withholding of the same, the defendant may be arrested and held to bail. Consequently, if the plaintiff fails in the action, and there is a judgment against him for the costs, he becomes himself the judgment debtor, and by virtue of § 288 of the code, is liable to arrest and imprisonment upon an execution issued in satisfaction of the judgment. *Merritt v. Carpenter*, 61
2. Where a prisoner, arrested by virtue of a criminal warrant indorsed pursuant to 2 R. S. 707, § 5, is discharged from arrest, by a justice of the peace of the county in which he is arrested, on entering into a recognizance before him, the warrant has spent itself, and the officer has no right to arrest the prisoner again, without new process. *Hogeboom, J. dissented. Doyle v. Russell*, 300

ASSESSMENT OF TAXES.

1. The revised statutes, in the provisions relative to the place where, and the persons to whom, property is to be assessed, as amended by chap. 176 of the laws of 1861, empower the assessors of a town to assess lands therein situated, occupied by a person other than the owner, (though owned by a non-resident,) to the owner or to the occupant, or as non-resident lands. *Johnson v. Learn*, 616
2. This leaves to the assessors a reasonable discretion, to be exercised with a view to the mode most likely to ensure the prompt and certain collection of the tax. *ib*
3. They have power to assess land to an owner, who is a non-resident, personally, provided it is "occupied by a person other than the owner;" and after they have adjudged land to be so occupied, and therefore assessable to the owner, this is a suffi-

cient justification to the collector, even though the assessors may have misjudged; provided there is nothing in the warrant to show him that the land was not occupied by a person other than the owner. *ib*

4. If the assessors have, in form, sufficiently assessed a lot to a person as owner, personally, the court will assume, for the protection of the collector, that the circumstances necessary to give them jurisdiction to make the assessment, existed. *ib*

ASSIGNMENT.

See DEBTOR AND CREDITOR, 1, 5.

ASSIGNOR AND ASSIGNEE.

See ACTION, 8, 4.  
COSTS, 3.  
JUDGMENT, 19, 20.

ASSUMPSIT.

See MONEY HAD AND RECEIVED.

B

BOND.

1. It is not necessary, in a complaint, to allege the loss of a bond, to entitle the plaintiff to prove its loss and give secondary evidence of its contents. *Board of Supervisors of the county of Livingston v. White*, 72
2. The doctrine of proferat has no place in the present system of pleading; ample provision otherwise existing for the production and inspection of papers. And, independent of proferat, there never was any necessity or reason for saying any thing about the loss of the bond sued on, in stating the cause of action. *Per T. R. Strong, J.* *ib*
3. What is sufficient evidence of the loss of a bond, to authorize the admission of secondary evidence of its contents. *ib*

See COUNTY TREASURER.  
VILLAGE COLLECTOR.

## BOOKS OF ACCOUNT.

See EVIDENCE, 1, 2, 3.

## C

## CASES DISAPPROVED.

*Clark v. Cleveland* (6 Hill, 340) disapproved. *Doyle v. Russell*, 300

## CHATTEL MORTGAGE.

1. The term "subsequent," in the 8d section of the act requiring mortgages of personal property to be filed, &c. (*Laws of 1833, p. 402.*) means after the time for re-filing has elapsed. *Latimer v. Wheeler*, 485
2. The omission to re-file a mortgage of that kind before the expiration of the year from its execution, will not render it invalid as against a subsequent mortgagee holding a mortgage upon the same property, executed within the year. *ib*
3. The defendant, being the owner of a hotel, and holding a mortgage upon the furniture therein, which was junior in date to one executed to the plaintiff, gave possession of the house and furniture to C. with strict instructions not to let any thing be taken away, because it was assigned to him. On the furniture being demanded, by the plaintiff, under his mortgage, of the defendant, in the presence of C., the defendant claimed that the goods were his, and refused to give them up; C. not interfering, but remaining entirely passive. In an action by the plaintiff, against the defendant, for the recovery and delivery of the furniture; *Held* that this was evidence to be submitted to the jury, upon the question whether the defendant had the possession, at the time of the demand, or not. *ib*
4. And that if the jury found that at the time of the demand and refusal the defendant had the possession of the goods, the plaintiff was entitled to recover; notwithstanding that up to the time of such demand and refusal, the actual possession might have been in C. *ib*

## COLLISION.

See STRAIBOATS.

## COMMISSION TO TAKE TESTIMONY.

A commission to take testimony is a writ or process issued by the special order of the court, and a seal is essential to its validity. If it be issued without a seal it confers no authority upon the commissioners, and depositions taken under it are extra-judicial and cannot be received in evidence. *Tracy v. Suydam*, 110

## COMMON LAW.

1. The provision in the constitution of 1777, declaring that such parts of the common law of England as were in force on the 19th day of April, 1776, should be and continue the law of this state, subject to alteration by the legislature, was nothing more nor less than an adoption of the *essential principles* of the common law, the application of which, to the condition of things here, often requires a modification, if not an entire change, of its rules; but which is merely the result of the application of general principles to particular facts. *Per JAMES, J. Morgan v. King*, 9
2. The principle is essentially the same, under all circumstances, but the rule, or mode, or standard, of application will vary with the facts, or the nature or character of the subject, to which the application is to be made. *Per JAMES, J. ib*
3. In adopting the common law, we have adopted its fundamental principles and modes of reasoning, and the substance of its rules, as illustrated by the reasons on which they are based, rather than by the mere words in which they are expressed. *Per JAMES, J. ib*

## COMMON SCHOOLS.

1. By the provisions of the act of the legislature of June 18, 1853, "to provide for the establishment of

union free schools," the school districts are preserved in their integrity, as divisions of the common school system of the state, and the officers thereof are still "school officers," and fall within that designation in the act of April 12, 1858, "to change the school year and to amend the statutes in relation to public instruction," which declares that the term of office of "all school district officers" theretofore elected shall expire on the 2d Tuesday of October, 1858. *Briggs v. Outwater*, 501

2. Accordingly, where, in October, 1858, the inhabitants of a school district not within any incorporated city or village, established a free school therein, under the act of June 18, 1858, and elected the defendants its trustees, or board of education, who were in office on the 2d Tuesday of October, 1858, at which time the plaintiffs were duly elected trustees, under the act of April 12, 1858; *Held*, that so far as those officers were concerned, the act of June, 1858, was superseded and repealed by the provisions of the act of April 12, 1858; and that the plaintiffs were the legal trustees of the district. *ib*
3. *Held also*, that the union free school in question, not being formed from two or more adjoining school districts, the free school might still be maintained, and the plaintiffs exercise the powers and authority of its board of education. *ib*

#### COMPLAINT.

1. In an action upon a specialty, by the obligee therein named, if the complaint avers that on, &c. "the defendant made his certain bond or obligation in writing, sealed with his seal, and in the words and figures following"—giving a copy of the instrument—and avers that the defendant has not paid the sum therein mentioned, or any part thereof, and that the whole amount thereof is still due and unpaid, this is sufficient, without any averment of a delivery. *The La Fayette Ins. Co. v. Rogers*, 491
2. An objection that a complaint is not sufficiently certain, in its allega-

tions, cannot be taken by demurrer. The defendant's remedy is by motion to make the complaint more definite and certain in the particular specified. *Village of Warren v. Philips*, 648

#### CONFESSIONS.

*See EVIDENCE.*

#### CONSTITUTIONAL LAW.

1. The act of the legislature, entitled "An act to incorporate the Metropolitan Gas Light Company of the City of New York," passed April 17, 1855, creating a corporation with authority to lay their pipes in the streets, &c. for the purpose of conducting gas, &c. upon their obtaining the permission of the two boards of the common council, was not unconstitutional and void, either because it established a monopoly in the trade or business of supplying gas within the city of New York; or because it took, for the use of the gas company, the streets or easements or privileges in the streets of the city, being the property of the corporation of the city, without making or providing for compensation to the city, and without the consent of the corporation of the city; or as coming within the constitutional prohibition against the creation of corporations by special acts. *The People v. Bowen*, 24
2. The 9th section of the act of the legislature, of April 17, 1858, "to amend the act to revise the charter of the city of Syracuse," by which a portion of the city of Syracuse, on the easterly line of the city and adjoining the town of Dewitt, was taken from the city and annexed to the town of Dewitt, and two assembly districts were thereby altered, without any provision being made in respect to the political status of the inhabitants of the exscinded and annexed territory, or defining their rights in reference to the assembly districts, or the manner in which they should participate in the election of representatives from the several districts, was a violation of the provision of the constitution, contained in the fifth section of the third

- article, that the assembly districts, when once fixed and determined by the board of supervisors, shall *remain unaltered*, until the next decennial enumeration; and is therefore void. *W. F. ALLEN, J. dissented. Kinney v. City of Syracuse, 349*
8. The *incidental* alteration of the boundaries of an assembly district, resulting from an act of the legislature changing such boundaries, is an alteration of a district, within the prohibition of the constitution. *ib*
  4. The provision in the constitution, which secures assembly districts, when once fixed and determined, from alteration, was intended to be, and is, not merely a prohibition upon the *board of supervisors*, but also a restriction upon the *legislative power* to alter and change the boundaries of towns. *ib*
- CORPORATIONS.**
1. An action claiming equitable relief on behalf of a foreign corporation, brought in the name of stockholders thereof, against another foreign corporation, a corporation formed under the laws of this state, and several individuals who do not appear to be residents of this state; in which action the complaint does not state that the plaintiffs are residents of this state, so as to entitle them to maintain an action against a foreign corporation for any cause; and in which it does not appear that the cause of action has arisen, or that the subject of it is situated, within this state, cannot be maintained. *Houss v. Cooper, 157*
  2. In order to warrant the bringing of an action by individual stockholders, in their own names, to set aside a sale, it is necessary to show that the constituted officers of the corporation, whose especial duty it is to vindicate its rights, have been requested to institute proceedings for that purpose, and have refused to do so. *ib*
  8. In an action for equitable relief against a corporation, it is improper to join, with that cause of action, a claim for damages against individual defendants. *ib*
  4. Although foreign corporations may, in some instances, sue or be sued in the courts of this state, yet, to warrant the proceeding, there must be either a necessity, or a fitness suggested by the peculiar circumstances. *The Cumberland Coal and Iron Co. v. The Hoffman Steam Coal Co., 159*
  5. The cause of action, or the subject, or at least some property to be acted upon, must have arisen, or be situated, within our jurisdiction. *ib*
  6. The courts of this state will not entertain jurisdiction of a suit between two corporations, both chartered by the laws of Maryland, respecting lands lying in that state, the object of which suit is to annul a conveyance of such lands made to the defendants, on the alleged ground of fraud, which conveyance was executed and acknowledged in Maryland, and put upon record there. *DAVIES, J. dissented. ib*
  7. Where the defendants, having been duly appointed by a corporation its building committee, and authorized to contract for materials for erecting a building in which to conduct its business, entered into a written contract with the plaintiff, under their respective hands and seals, describing themselves therein as "building committee," and signing it as such, for the purchase of a quantity of brick; *Held* that the corporation was liable, on the contract, notwithstanding the *seals* of the defendants were affixed thereto. *Haight v. Sahler, 218*
  8. And, the defendants having shown that they were fully authorized by the corporation, in fact, *a priori*, to make the contract, and that after it was so made, the corporation ratified it, by making several payments thereon, and otherwise; *Held also*, that the defendants were not liable personally, on the contract. *ib*
  9. A corporation cannot become surety, either as an accommodation indorser, or in any other form; unless the note has been discounted in good faith, in consequence of representations made by its proper officers that it was the note of the corporation; or unless the note has passed into the hands of a bona fide holder without

notice, who has paid a valuable consideration for it. *The Bridgeport City Bank v. The Empire Stone Dressing Company*, 421

10. A corporation, when suing, need not aver or prove its corporate existence, upon the trial, unless it be expressly pleaded that it is not a corporation. *The La Fayette Insurance Co. v. Rogers*, 491

11. What will amount to a confirmation or ratification, by the stockholders of a corporation, of a sale made by its directors. *Cumberland Coal Co. v. Sherman*, 553

See DEATH BY WRONGFUL ACT, &c.

### COSTS.

1. Costs do not become a debt against a party to an action, until judgment; unless he agrees to pay them. *Warfield v. Watkins*, 396

2. The plaintiff brought his action to recover damages against the defendant, for entering the plaintiff's premises and taking possession of certain personal property; and he obtained an injunction to restrain the defendant from meddling with the property. He then sold the goods himself, and received the avails. The defendant claimed the property as mortgagee, by virtue of a mortgage executed by one S., and alleged in his answer, that being prevented by the injunction, from removing and disposing of the property, he lost his debt against S. On the trial the defendant proved that a portion of the goods belonged to him, and he recovered a judgment against the plaintiff, for the conversion thereof, for a sum over \$50; Held that from the form of the action and the mode of procedure which the plaintiff had adopted, the defendant must be considered the successful party, and was therefore entitled to costs. *Ashley v. Marshall*, 426

3. Where an action is brought by a party as assignee, under an assignment made by a debtor, for the benefit of creditors, and the answer denies the right of the plaintiff to bring the action as such assignee; and the court decides that the assignment

was void, and that no title to the property passed to the plaintiff under the same; and thus determines that the action was not brought by the plaintiff, as assignee or trustee of an express trust, he cannot claim exemption from costs on the ground that he was such. *Clerke, J. dissented. Sibell v. Remsen*, 441

### COUNTER-CLAIM.

1. Where matters in controversy between parties are mutually submitted to arbitration, and bonds to abide the decision of the arbitrators are mutually executed and delivered, and after the hearing before the arbitrators has been commenced, but before the same has been completed, one of the parties revokes the submission, and thereupon brings an action against the other party to the submission, to recover the claims so submitted, the latter may, in such action, recover by way of counter-claim the damages sustained by him by reason of the revocation, viz. the expenses paid for witnesses, on the arbitration, and such other legitimate expenses as would be recoverable in an action upon the bond. *Curtis v. Barnes*, 225

2. An insurance company, located in Philadelphia, entered into an agreement with the plaintiffs, whereby, for the purpose of extending and more firmly establishing the business of insurance in the city of New York, it agreed to provide and set apart in the hands of the plaintiffs, as trustees, a fund to be formed by the premium notes and cash premiums received by said company, for insurances to be effected by them in New York, to the amount of \$100,000; which fund was to be held by the plaintiffs for the payment of all losses under such insurances, and for no other purpose. Subsequently the company, through the plaintiffs as their agents, effected numerous insurances, in New York. Among others, the defendants gave a note to the company, for premiums on policies issued by the company; which note was duly indorsed to the plaintiffs for the purposes of the trust. In an action by the plaintiffs, as trustees, upon the note; Held that until all insurances

effected by the plaintiffs as agents of the company were discharged, the company could not reclaim from the plaintiffs any of the securities assigned to them; and that no creditor of the company had any right until that time, to have his claim against the company paid from such notes, or their proceeds. Accordingly *held*, that in such action upon the note, the defendants could not set up as a counter-claim, a claim held by them against the insurance company, for a loss under a policy. *Duncan v. Stanton*, 538

See GUARDIAN AND WARD.

### COUNTY COURT.

The county courts of this state are courts of common law jurisdiction, and have jurisdiction in proceedings for the naturalization of aliens, under the act of congress. *MULLIN, J.* dissented. *The People ex rel. Smith v. Pease*, 588

### COUNTY TREASURER.

1. Where an instrument is presented to the board of supervisors, by a county treasurer, as his official bond, the fact that it was sealed may, in the absence of any direct evidence on that subject, be inferred from the instrument being presented as a bond, which implies a sealed obligation. *Board of Supervisors of the County of Livingston v. White*, 72
2. A judgment in favor of the people, against a county treasurer, in an action for the recovery of money received by him in his official capacity, and the imprisonment of the defendant upon an execution issued on that judgment, do not constitute any defense to a subsequent action against such county treasurer and his sureties, brought by the board of supervisors, for the recovery of the same money. *ib*
3. The provisions of the revised statutes on that subject contemplate a double direct liability by the county treasurer; one by him individually to the state, so far as the state tax is concerned, and the other by him, in connection with his sureties, to the county, on his bond, embracing the entire duties of the treasurer;

upon each of which liabilities an action may be maintained. *ib*

4. The imprisonment of a treasurer, at the suit of the state, does not affect in any way the action at the suit of the county. Such an imprisonment is not a satisfaction of the liability which is the subject of that action. *ib*

### COVENANT.

See DEED, 3, 4.

### CROTON AQUEDUCT BOARD.

1. The Croton aqueduct board has full power under the statutes, and the ordinances of the common council, to make special charges, or fix extra rates, to be paid for the use of the water, varying in each case, according to the quantity used; and to regulate the terms on which extra allowances shall be made, and the conditions on which the water shall be used. *Treadwell v. Van Schaick*, 444
2. The board has a right to make every such arrangement, respecting an extra supply of water, a matter of agreement, subject to such terms and conditions as it shall deem necessary to impose. *ib*
3. The proper construction of the 27th section of the act of 1849, establishing the board, is that the legislature intended the water should not be furnished to those who would not pay for it; and that the power should exist, in the board, to withhold the supply, if the terms on which the supply was furnished were not complied with. *ib*
4. The board therefore has power to cut off the supply of water, for non-payment of the water rate; whether it be the regular rents, apportioned by the size, character and use of the building, or the extra rents chargeable, in addition to the regular rents, upon buildings which consume an extra quantity of water. *ib*

### D

### DAMAGES.

See AGREEMENT, 3, 4.

DEATH BY WRONGFUL ACT, &c.

1. No action would lie, at common law, in this court, against a corporation created by the laws of this state, for causing the death of an individual in another state or country, by the negligence and unskillful conduct of its agents and servants, even if the death occurred in this state. *Crowley v. The Panama Rail Road Company*, 99
2. Nor will such an action lie, since the passage of the acts of the legislature, of 1847 and 1849, giving a right of action to the next of kin of persons killed by the wrongful act, default or neglect of another; in the absence of any clause in the defendant's charter subjecting the corporation to the operation of those acts, as a part of the condition of its being. *ib*
3. Those statutes are purely *local*, and limited to the sovereignty and dominion of the state; and they only apply when the subject matter of the action arose within the state. *ib*
4. Where a complaint alleged that on, &c. at the city of New York, for a reasonable compensation paid by B., the plaintiff's intestate, the defendant, a corporation chartered by the laws of New York, agreed to convey B. over its rail road from Aspinwall to Panama, in New Grenada; that the defendant subsequently received B. on its rail road, at A.; and its servants and agents so negligently and unskillfully conducted themselves in the management of the said rail road that through such negligence B. was killed while a passenger in one of the defendant's cars; *Held*, on demurrer, that the action would not lie, it not being founded upon the contract, but upon a tort, committed in another country, the right of action for which did not survive, and for which the court had no jurisdiction under the acts of 1847 and 1849. *ib*
5. The cause of action under the acts of 1847 and 1849 is a new and original one, given by, and depending wholly upon the statute. *ib*
6. The statutes of New York, passed in 1847 and 1849, giving an action

for damages, to the families of persons killed by the wrongful act, neglect or default of others, were intended to regulate the conduct of corporations, their agents, engineers, &c. and of other persons, whilst operating or being in this state, only. If a citizen of this state leaves it, and goes into another state, he is left to the protection of the law of the latter state. *Beach v. The Bay State Steamboat Co.*, 488

7. An action will not lie, in the courts of this state, under those statutes, for a wrongful act or omission, occurring out of this state and within the bounds of another state, by which a death is caused. *CLERKE*, J. dissented. *ib*

DEBTOR AND CREDITOR.

1. A mere creditor at large, without any judgment against his debtor, or lien upon his property or right to a preference in payment out of it, cannot maintain an action against such debtor and his assignees, to set aside an assignment of such property, executed by the debtor. *Cropey v. McKinney*, 47
2. A creditor who has commenced an action at law, for the recovery of his debt, in which an attachment has been issued and levied upon the property of the debtor, cannot bring a second action in the supreme court, for the recovery of his debt, to set aside an alleged fraudulent judgment previously recovered against the debtor, and for an injunction to restrain the paying over of the proceeds of a sale of property levied upon by virtue of an execution issued on such judgment. *ROOSEVELT*, P. J. dissented. *Mills v. Block*, 549
3. In such a case the creditor must wait until he has established his debt by judgment, before he will be entitled to an injunction, or other equitable relief against the judgment alleged to be fraudulent. *ib*
4. And *if seems* the creditor has a complete remedy *at law*, by proceeding with the attachment suit, obtaining a judgment therein, and selling the property, under it. *ib*

5. An assignment executed by a manufacturing corporation, of all its property, to a trustee, in trust for the benefit of creditors, which expressly admits that it is made in consequence of the company having become unable to pay its debts, is absolutely void by statute. (1 R. S. 608, § 4.) *Loring v. United States Vulcanized Gutta Percha Co.*, 644

## DEED.

1. Where the owners of a farm conveyed the same in fee, on condition that the grantee should support and maintain them during their respective lives; *Held* that this was equivalent to receiving a life annuity as the purchase price, which was a valuable consideration. *Spalding v. Hallenbeck*, 292
2. *Held also*, that there was a binding agreement, on the part of the grantee—manifested by his accepting the deed and entering into possession under it—to maintain the grantors, which was a sufficient consideration to support the deed. *ib*
3. A covenant, in a deed of conveyance, by which the grantors agree to warrant and defend the premises, against themselves, their heirs, &c. and against all persons claiming or to claim the same, against the acts of the grantors, "hereby intending to warrant and defend the said premises against any lien, judgment or incumbrance against any of the grantors, affecting the premises or any part thereof," is merely a covenant for quiet enjoyment. *Ingersoll v. Hall*, 392
4. The mere purchase of an outstanding title, subject to a life estate in the premises, by a grantee whose title is also subject to that life estate, the owner of which outstanding title had given notice of his right, and of his intention to enforce it, is not a breach of such a covenant; nor will it amount to an eviction, where there has been no interference with the possession, under the outstanding title. *ib*

## DOGS.

1. To hold the owner of a dog liable for an injury committed by him, it

must appear that the dog was vicious and the owner knew it, or that he was a trespasser, at the time of doing the injury. *Per CAMPBELL, J. Fairchild v. Bentley*, 147

2. If an individual knows that his dog is in the habit of following teams driven by such person, and of watching them after they are hitched and left by him; and if he knows that such dog is accustomed to attack and bite strangers approaching teams so watched, he is liable for any injury done by the dog to a person lawfully approaching the team for the purpose of unhitching it. *Mason, J. dissented.* *ib*
3. A man owning such a dog, knowing its character, must secure it at home so that it will not follow him. If it follows him, and bites a person rightfully coming to remove the team from an inn shed where the owner has left it, and where the dog is watching it, such owner is liable in damages. *Mason, J. dissented.* *ib*
4. Whether, in such a case, a dog has a right to follow his master and lie down in the open shed of a public inn, or whether he is *quoad* the master, an involuntary trespasser, the master is not liable, in an action of trespass, for the injury done by him without proof of knowledge of his vicious habits. *Per CAMPBELL, J.* *ib*

## E

## EJECTMENT.

1. Where, in an action by the people to recover the possession of real estate, the answer denied the allegations of the complaint, and averred that no title accrued to the people within forty years, and that the defendants acquired title in 1786, and had been in possession ever since; *Held* that, to warrant a recovery, the plaintiffs must show either a title in themselves, or a vacant possession. *People v. Rector &c. of Trinity Church*, 537
2. Under such circumstances, the plaintiffs cannot maintain their action on the ground that the people are the

presumptive owners of all lands in the state, until title in another is shown, and that in ejectment it is not necessary for the people to prove title, in the first instance. *ib*

3. Where proof is furnished, of a tenant being in possession, the presumption is a fair one, that such possession is legal; and until the plaintiffs show some right to the possession within forty years, they do not furnish sufficient evidence to dispossess the defendant of the property claimed. *ib*
4. Under the section of the code allowing a party to set up, in an action to enforce a legal right, an equitable as well as a legal defense, if a defendant in an action of ejectment shows an equitable right to the possession of the premises, as against the plaintiff, judgment should be given for him. *Thurman v. Anderson*, 621
5. The defendants were in possession of land, under a lease for a term of years, from W., who had contracted to purchase the premises, and was in possession under his contract. After the making of the lease, and after the defendants had taken possession, the plaintiff, with notice of the defendants' rights, took an assignment of the contract of purchase, from W., and subsequently fulfilled the contract of purchase and obtained a deed of the premises. He then brought this action against the defendants, to recover the possession. *Held* that the plaintiff had no equity as against the defendants; and that, his legal title having relation to the contract, was subject to the right of the defendants to occupy under their lease. Judgment in favor of the plaintiff reversed, and new trial granted. *ib*

#### ELECTIONS.

1. The action in the nature of *quo warranto*, under the code, although differing in some of the formula of procedure, from proceedings by information or by writ of *quo warranto*, is nevertheless, in substance, the same, and is governed by all the rules which regulated the proceedings under the former practice. *People ex rel. Smith v. Pease*, 588

2. Boards of inspectors of elections are not judges, nor do they exercise a judicial power, in receiving and counting the votes and declaring the result. *PRATT*, P. J. and *MULLIN*, J. dissented. *ib*

3. It is competent for the legislature to make the inspectors of elections the sole and final judges of the qualifications of persons offering to vote. But it has not done so. The elector is made the judge of his own qualifications, and his conscience takes the place of the judgment and decision of every other tribunal, for that occasion. They may instruct and advise him, but they cannot decide upon his qualifications. *ib*

4. The statute prescribes in what case the inspectors may reject a vote, viz. upon the refusal of the party to take the oaths; and they can reject in no other case. *Expressio unius est exclusio alterius*. *ib*

5. The inspectors act ministerially, in determining whether they will receive or reject the vote. *ib*

6. Hence the question of the qualification of a person offering to vote is, like other questions, open to litigation in the courts, when the right of the voter is directly in issue, either in an action against the board of inspectors, for rejecting the vote, or for knowingly permitting a person to vote who is not qualified; or, in a proceeding properly instituted, to determine the right to an office, or to punish the illegal voter. *PRATT*, P. J. and *MULLIN*, J. dissented. *ib*

7. Accordingly *held*, that in an action in the nature of a *quo warranto*, to try the title to an office, the defendant may give evidence tending to prove that a number of those who voted for the relator, and sufficient to change the result, were not properly qualified voters, or entitled to vote at the election. *PRATT*, P. J. and *MULLIN*, J. dissented. *ib*

#### EVIDENCE.

1. To render books of account competent evidence, the party must prove that during the period the charges were made, he had no clerk; that

some of the articles of work were delivered or performed; that the books are the account books of the party, and that he keeps correct accounts. *Tomlinson v. Borst*, 42

2. The statute allowing parties to be witnesses, has not abrogated the law admitting books of account as evidence, under the rules formerly settled. *ib*

3. Where a plaintiff offers his books of account as evidence in support of his claim, the defendant will not be permitted to prove the general moral character of the plaintiff to be bad, for the purpose of discrediting such books. *ib*

4. Where the confessions of the defendant are given in evidence, to show his agency in a particular transaction, it is proper to instruct the jury that they may believe a part and reject another part of the allegations made by the defendant; that they may believe the fact which he admitted, and disbelieve the reasons assigned for it. *Barnes v. Allen*, 668

*Secondary Evidence.*—*See* *BOND*.

#### EXCEPTIONS.

*See* *PRACTICE*, 1.

#### EXECUTION.

*See* *APPLICATION OF PAYMENTS*.

#### EXECUTORS AND ADMINISTRATORS.

1. Where a claim is presented to executors, against the estate of their testator, the justice of which is disputed, and the parties agree to refer the same, under the statute, the agreement to refer need not notice matters of defense to the claim. *Tracy v. Suydam*, 110

2. On the approval by the surrogate of the agreement to refer, and filing the same in the office of a clerk of the supreme court, the agreement becomes operative as a voluntary appearance by the parties, in this court, and a submission to its juris-

diction, for the purpose of adjudication upon the claim presented. *ib*

3. The account presented is, in effect, the plaintiff's complaint, and there being no pleadings, and no provision in the statute for pleadings, the defendant is limited to no particular defense; and consequently any and every legal defense against the claim must necessarily be available. *Per SMITH, J.* *ib*

4. On the trial before the referees, the plaintiff must prove his claim, and satisfy the referees of its justice and validity; and every species of legal proof adapted to show the injustice of the claim, or its invalidity as a whole, or in degree or amount, is admissible. *ib*

5. Within this rule, a set-off may be proved; or a payment in whole or in part; or proof given to reduce the amount. *ib*

6. And the executors are at liberty to make any defense that their testator could himself make, if alive, and the same were properly pleaded, in an action upon such claim. *ib*

7. They may, therefore, insist upon the statute of limitations; and if that defense is sustained, it is a complete answer to the whole cause of action. *ib*

#### F

#### FENCES.

1. Where a division fence between adjoining owners has been in existence, and acquiesced in by the parties as on their dividing line, for more than forty years, the law will determine the line of such fence to be the true line between the parties. And this, notwithstanding the fence was originally put up under an agreement that it was to be altered at some future time, in case it should be found, upon actual survey, not to be on the true line. *Pierson v. Mosher*, 81

2. In such cases, it is the long acquiescence which renders the practical location conclusive. *ib*

FERRY AT ALBANY.

See WESTERN RAIL ROAD CORPORATION.

FRAUDS, STATUTE OF.

1. Where one purchases goods of another, agreeing to apply the amount, agreed on as the price, in payment of a precedent debt, by giving credit therefor, the transaction, so long as it rests in mere words, is void by the statute of frauds; but is valid the moment the act of giving the credit is performed by the buyer. *Brabin v. Hyde*, 265
2. B. being indebted to H., it was agreed between the parties that H. should take certain property of B., which was pointed out and the price of which was agreed on, and credit B. the sum specified as the price, upon his books. This was done by H. as soon as he got home, where his books were kept, which was during the same day and within a very short time after the making of the agreement. *Held* that this was to be regarded as a payment made at the time of the agreement, within the meaning of the statute of frauds; and was a complete execution and performance of the contract, on the part of H., and a payment of B.'s debt, to the extent of the price agreed on. 26
3. The moment payment is made, in pursuance of such an agreement, the transaction is taken out of the statute of frauds, the party is bound by his bargain, and he cannot afterwards rescind it, or treat it as a nullity. 26

G

GIFT.

In an action to recover possession of a farm, it was proved that a son of the plaintiff married the defendant, in 1849, and had two children by her, one of whom was living; that the son, in 1850, went into possession of the farm, by permission of the plaintiff, and occupied it until his death, in 1855; the plaintiff, during such occupancy, frequently saying the

farm was his son's. The defendant offered to prove that her husband worked for the plaintiff about eight years after he became of age, at the plaintiff's request; that in consideration thereof, and of love and affection, the plaintiff gave the farm, by parol, to his son, who, in virtue thereof, entered on the premises, took possession, and made improvements, and paid taxes, on it, as his own, by and with the approbation of the plaintiff; that the plaintiff always treated his son as owner, and at the deathbed of the latter informed him and his wife that he would never disturb them. The evidence was excluded. *Held* that the evidence offered should have been received; and that it would have entitled the defendant not only to hold the farm, but to receive such a conveyance from the plaintiff as would vest in her and her surviving child the title to the farm, according to their respective rights as widow, mother, daughter and heirs. New trial granted. *CAMPBELL, J. dissented. McCray v. McCray*, 683

GOVERNOR.

The governor may approve and sign a bill after the adjournment of the legislature, so as to render the same valid and binding as a law. *The People v. Bowen*, 24

GUARDIAN AND WARD.

An acting administrator was appointed general guardian of the infant children of the intestate, and he and the widow and children resided together, as one family, in the dwelling house formerly owned by the testator; and he subsequently married one of the infant children and continued to reside there, with his wife. He advanced the means, from time to time, and paid the expenses incurred in the support of the family. At three several times, as general guardian of the infants, he obtained orders from the county court, for the sale of the lands which had descended to his wards, from their father, and in which the widow had an estate in dower. the proceeds of which sales, including the widow's share, for her dower interest, went

into his hands. In an action brought against the administrator and guardian, by the widow, to recover a compensation for her dower interest; *Held*, that under these circumstances the law would not imply a promise on the part of the widow to repay to the guardian the money thus furnished or expended by him, in support of the family; but that on the contrary, the legal inference was, the money was furnished and advanced by him as *guardian*, and not as *creditor of the widow*. Accordingly *held*, that the moneys thus advanced by the guardian could not be set off or allowed as a counter-claim, in such action, against the widow's claim for dower. *Elliott v. Gibbons*, 498

## H

### HIGHWAYS.

1. An order laying out a highway, signed by only two commissioners of highways, and not containing any statement showing that the third commissioner met and deliberated with them upon the subject matter of the order; or that he was duly notified of the meeting, and failed to attend, is void. *Stewart v. Wallis*, 844
2. If an order is defective in omitting to state those facts, the defect cannot be cured by parol evidence, showing that the third commissioner was duly notified, and failed to attend. 2b
3. The *form* by which private property may be taken, for the purpose of laying out a public highway, having been prescribed by statute, that form must be strictly pursued, or the attempt will be ineffectual and the proceedings void; and all persons, acting under color of them, will be trespassers. 2b

See RIVERS.

### HUSBAND AND WIFE.

1. By marriage the husband becomes vested with a right to all of the wife's goods and chattels, and to her earnings, and the property acquired

by her subsequently in carrying on a business in her own name. *Cropsey v. McKinney*, 47

2. Such a case is not affected by the acts of 1848 and 1849, giving additional rights to married women; where the question arises between the assignees of the husband and assignees of the wife. 2b
3. A deed of separation, between husband and wife, if executed without any consideration, is void at law even between the parties thereto. And it is void and of no effect, even in equity, as against the assignees of the husband, on a question arising as to the title to the property embraced therein. 2b
4. The wife's covenant with her husband, in a deed of separation, being void, cannot form a consideration for the execution of the deed by him. 2b
5. A deed of separation between husband and wife, by which the former relinquishes to the latter personal property and a business carried on by her in her own name, for her sole and separate use, and covenants that the property and business, and the profits of the business, shall thereafter belong to, and be carried on by her for her sole and separate use as if she were a feme sole, being executed without consideration, and without any covenant on the part of the trustee to indemnify the husband against the debts of the wife, is void even in equity, as to subsequent creditors. 2b
6. The assent of the husband to his wife carrying on a business in her own name, carries with it an implied authority to contract debts, in conducting the business in her name. 2b
7. And debts thus contracted, although contracted in the name of the wife, are the debts of the husband, and he is liable to be sued for them. 2b
8. The husband, in such a case, has the right to make an assignment for the benefit of creditors, of the property in his wife's possession and of the business carried on by her; and such assignment will carry the title

- to such property, as against the assignees of the wife. *ib*
9. The assent of the husband that his wife shall carry on a business in her own name, does not carry with it an implied authority to her to make an assignment for the benefit of creditors. *ib*
10. In an action for maliciously enticing and carrying away the plaintiff's wife from his house, evidence of a general report that the plaintiff ill treated his wife, is inadmissible by way of justification. *Barnes v. Allen*, 668
11. Nor will the mere statements of the plaintiff's wife, that she was abused by her husband, without any proof of such abuse, in fact, be a justification for the defendant's advice to her to leave her husband, and for his agency in removing her from her husband's house to that of her father. *ib*
12. To justify his interference in removing the wife from her husband's house, the defendant is bound to show that she was abused. Her statement that she was abused is not sufficient. *ib*
13. Whenever a wife is not justifiable in abandoning her husband, he who knowingly and intentionally assists her in thus violating her duty, is guilty of a wrong, for which an action will lie. *ib*
14. That which will excuse a man for harboring the wife of another, will not excuse an act of interference in the husband's affairs, either in advising her to leave her husband's premises, or in carrying her away. *ib*

See WITNESS, 3, 4, 5.

# I

## INSURANCE COMPANIES.

1. The charter of a mutual insurance company provided that when any property insured by the company should be alienated, the policy should thereupon be void, and be surrendered to the directors, to be

canceled; and that upon such surrender the assured should be entitled to receive his deposit note, upon the payment of his proportion of all losses and expenses that had occurred previously. The by-laws contained a provision that whenever a party insured should mortgage the property, his policy should be void, unless he should give notice thereof to the company. At an annual meeting of the members of the company, it was resolved that when an insured had alienated his property before loss sustained, his premium note should not be assessed, although he had not surrendered his policy. *Held* that, independent of the resolution, passed by the company, a person insured who had alienated the insured property by mortgage and deed, without giving notice to the company of such alienation, or surrendering his policy, remained liable, upon his premium note, for losses occurring subsequent to the alienation. But that by the resolution the company waived a compliance by its members with the provisions of the charter relating to a surrender of the policy, &c. and in effect declared that it would dispense with the formality of a surrender, when there were no losses to be paid, and the assured had alienated the insured property; and that it would itself take notice of the alienation, and would make no assessment upon the premium note, to pay future losses. *Huntley v. Bescher*, 580

2. Accordingly *held*, that the receiver of the company could not maintain an action to recover an assessment upon a premium note thus situated, made for the purpose of paying losses occurring since the alienation of the property. *ib*
3. *Held also*, that the resolution was not void, as being in conflict with the provision contained in the charter of the company. *ib*
4. The fact that the charter of an insurance company expires, by its own limitation, within the period during which a policy is by its terms to continue, will not avoid the policy, and discharge the insured from his liability upon his premium note. The policy is valid for the unexpired term of the charter. *ib*

5. Nor will the insured be entitled to any rebate, or deduction, from the amount of an assessment, or from the amount of the premium note, on account of the fact that the charter of the company was to expire, and did expire, prior to the expiration of the period during which the policy, by its terms, was to continue. 5b

### INTEREST.

See AGREEMENT, 4.

## J

### JUDGMENT.

1. A statement upon which a judgment is entered by confession, which alleges the consideration for the judgment to be a promissory note given by the debtors, to the plaintiff, for value received, but without specifying the amount or consideration of the note, is defective; and it has been held in repeated cases that such a judgment may be set aside on motion, at the instance of other judgment creditors. *Norris v. Denton*, 117
2. And the right to set aside, or attack, a void judgment thus entered up by confession, upon a defective statement, is not limited to judgment creditors. 5b
3. A judgment confessed without full compliance with the provisions of the code, is to be deemed fraudulent and void, as against the creditors of the judgment debtor; and it may be attacked by a grantee or mortgagee of premises upon which such judgment is a lien, as well as by judgment creditors. *Johnson, J. dissented*. 5b
4. They may do this, either by bringing an action for that purpose, or in defense of an action brought to enforce such judgment, to which they are made parties. 5b
5. A judgment, entered by confession, upon a statement in these words: "The above indebtedness arose on a promissory note made by the defendants to the plaintiff, dated June 21, 1864, in the sum of \$700, with interest, that amount of money being had by the defendants of the plaintiff, and upon which there is this day due the sum of \$782.07, together with \$80.41, now due the plaintiff from the defendants as costs in an action brought against the defendants by the plaintiff on said promissory note, in the supreme court, which suit is now discontinued by the plaintiff upon this confession of judgment to him by the defendant," set aside, on the ground of the insufficiency of the statement. *Freigh v. Brink*, 144
6. A motion to set aside a judgment entered upon confession, on account of the defectiveness of the statement, is not founded upon an irregularity, so as to require the moving party to specify in his motion papers the grounds of the motion. *Winnebrenner v. Edgerton*. 185
7. Defects of that nature are not mere irregularities. They are matters of substance, and if established, render the judgment void. 5b
8. Requisites of the statement of indebtedness, upon which a judgment by confessor is to be entered. 5b
9. A statement, upon which a judgment by confession is entered, in these words: "This confession of judgment is for a debt justly due to the plaintiff, arising upon the following facts: for money lent and advanced by said plaintiff to me on the 1st day of April, 1856, and interest on the same from the 1st day of April, 1857," is defective, in not showing that the sum for which judgment is confessed "is justly due or to become due;" that is, that the sum confessed does not exceed the debt or liability. *Clements v. Geow*, 325
10. So, a statement in this form: "This confession of judgment is for a debt justly owing from me and due to the plaintiff, arising from the following facts: for money borrowed by me, of him, in June, 1855, for which I gave him my note, and one year's interest thereon," is defective for the same reason. 5b
11. So also, held of a statement as follows: "This confession of judgment is for a debt justly due and owing

- from me to the plaintiffs, for goods, wares and merchandise, groceries, dry goods, salt, calico, muslin, molasses, sugar and other articles, sold and delivered by them to me at various times within the last two years, as per schedule annexed;" no schedule being in fact annexed. *ib*
12. The amount of the debt, for which judgment is confessed—and if it be for money lent and advanced, the amount of money loaned, and if it is for goods sold and delivered, the amount of the sales, or total price of the goods—must be set forth explicitly, and not be left to inference. *ib*
13. This is a vital part of a valid confession; and the omission of it is a fatal defect. *ib*
14. A party whose judgment has been illegally vacated will not be deprived of his lien, if he ultimately reverses the order which set aside his judgment; unless the equities of bona fide purchasers or incumbrancers intervene. *King v. Harris*, 471
15. Thus, where a judgment which was the first lien upon mortgaged premises after the mortgage, was vacated and set aside on the ground of irregularity, by an order which was subsequently reversed on appeal; *Held*, that the lien of such judgment was not lost, by the vacatur; but that the judgment was entitled to be first satisfied out of the surplus moneys arising from a sale of the premises, under the mortgage, in preference to junior judgments. *ib*
16. A judgment will not be set aside, and a new trial granted, on the grounds of *surprise* or *newly discovered evidence*, where the party has been guilty of laches, in making his motion; where the new evidence would be cumulative in its nature; or after judgment has been entered. *Peck v. Hiler*, 655
17. And though the plaintiff's evidence be a surprise upon the defendant, yet the defendant may, by his own conduct, preclude himself from all relief on that ground. *ib*
18. Thus, where the defendant, though present at the trial, instead of asking for a postponement on the ground that the plaintiff's evidence was a surprise upon him, examined a witness on the subject testified to by the plaintiff's witnesses, and sought to show by him that the facts to which they had sworn were not true; and at the close of the testimony, agreed that the written points of both parties should be submitted for the consideration of the court, without any suggestion of surprise, or any request that the decision should not be made on the case as it stood; and in consequence of his omission to furnish his points, nearly seven months elapsed before the decision of the judge was made; several motion terms in the mean time having been held, at which an application could have been made by him to open the case; instead of doing which, he permitted the court to examine and decide upon the evidence adduced, without any interference or complaint on his part; and gave no intimation of having been surprised by the plaintiff's evidence, until three months after the decision of the court was made; *it was held* that the defendant, by his conduct, must be presumed to have been willing to abide by the decision of the court on the questions of fact presented for its determination; and that he could not repudiate and reject that decision after it was found to be adverse to him. *ib*
19. Where a person takes an assignment of a judgment, with notice of a stipulation entered into by his assignor, the plaintiff in the judgment, relative to the method of enforcing it, he cannot maintain an action to have the stipulation vacated on the ground that his assignor was induced to enter into it by the fraud of the other parties to it. *Borst v. Baldwin*, 180
20. The assignment of the judgment is an affirmation thereof, but will not carry with it a right of action for the fraud; nor is such right of action susceptible of assignment, so as to authorize the assignee to sue in his own name. *ib*

## LANDLORD AND TENANT.

*See LEASE.*

## LEASE.

1. The plaintiff executed a lease of premises to V. as the agent or trustee of an association, of which the defendant, a corporation, was the successor. The association transferred all its property to the corporation, and caused the lease to be assigned to the corporation, and the latter covenanted to do and perform all things which the association were bound to do. *Held* that the plaintiff could maintain an action against the defendant, upon the covenant for payment of rent, in the lease; and that he could recover thereon, for rent during the whole term. *Van Schaick v. Third Avenue Rail Road Company*, 189
2. Where leases for years and for lives contained a provision that if the yearly rents reserved should be in arrear or unpaid, in whole or in part, for twenty days after the days of payment, the leases, and the estates granted, should cease and determine, and be and become absolutely void and of no effect; and that the lessor might re-enter, and have and enjoy the premises as of his former estate; *Held* that the enforcement of a forfeiture arising from a non-payment of rent by a recovery of the possession of the premises in an action against the tenant, rendered the leases void *only from the time the forfeiture occurred*; and did not bar an action by the lessor, for the recovery of the rents due at the time of the default, viz. the same rents, for the non-payment of which the forfeiture was incurred. *Mattice v. Lord*, 382
3. The leases are void from the day of forfeiture, but are valid for the previous time. *ib*

## LIMITATIONS, STATUTE OF.

See EXECUTORS AND ADMINISTRATORS, 7.  
PLEDGE.

## M

## MANDAMUS.

See OFFICE AND OFFICER, 5.

## MARRIAGE.

1. Where a husband absents himself from his wife for the space of five successive years, without being known to her to be living during that time, and she then marries another person, in good faith, supposing her former husband to be dead, her second marriage will be void only from the time its nullity shall be pronounced by a court of competent jurisdiction. *Cropsey v. McKinney*, 47
2. And it can be declared void only on the application of one of the parties to it, during the lifetime of the other. It cannot be declared void collaterally, after the death of the first husband, in actions instituted by creditors. *ib*

## MARRIAGE SETTLEMENT.

1. An objection to the validity of a marriage settlement, on the ground that the parties to it were infants, can only be made by the parties themselves. *Jones v. Butler*, 641
2. It is not, for that cause, void, but voidable merely, at the option of the infants on arriving at full age. If they do not, within a reasonable time, seek to avoid it, they will be considered as ratifying it. *ib*
3. The objection cannot be made by the trustee acting under it and holding property received by virtue of it, when a court of equity is asked to compel him to render an account. *ib*
4. He cannot dispute the authority under which he holds the trust funds, and seek, in that manner, to retain the trust property to his own use. *ib*

## MONEY HAD AND RECEIVED.

1. It is an elementary principle, that where one person receives money for another, and the law makes it the duty of the receiver to pay it to the person for whom or for whose use it is received, a promise to pay it in accordance with the duty, is always presumed, and a privity established, as matter of law, between the par-

ties. *Per* JOHNSON, J. *Ross v. Curtis*, 288

2. Where money is directed, by a statute, to be paid by a county treasurer to the supervisor of a particular town, whose duty it is to apply the money thus received, in payment of certain bonds issued by the town, such supervisor, after receiving the money, holds it as trustee or depository for the bond holders, and is liable to them in an action for money had and received. *ib*
3. And in such an action, the defendant will not be permitted to go behind the payment of the money to him, to question the validity of the bonds. *ib*

### MORTGAGE.

1. A mortgage, being a valid instrument, as between the mortgagor and mortgagee, a subsequent judgment creditor has nothing to say, in respect to its being recorded or otherwise. The recording act relates to subsequent purchasers in good faith and for a valuable consideration, and not to judgment creditors. *Thomas v. Kelsey*, 268
2. A subsequent judgment will not be preferred over a prior unregistered mortgage given to secure future advances or liabilities; unless there has been a fraudulent intent, on the part of the mortgagee, in withholding his mortgage from the record. *ib*
3. The mere fact of retaining a mortgage six or seven months, without having it recorded, will not operate as a fraud upon subsequent creditors of the mortgagee, by the mortgagor, so as to postpone the mortgage to their judgments. *ib*
4. A junior mortgagee, coming to redeem mortgaged premises from a sale under a decree of foreclosure in a suit upon a prior mortgage, must pay, not only the amount of principal and interest due upon the prior mortgage, but the costs of the foreclosure suit; notwithstanding he was made a party to such suit. *Gage v. Brewster*, 387
5. The referee, in a mortgage case, determined all the issues made by the

answer of the defendants who had appeared, against them, and no further trial, as to them, could be had. The plaintiff—not being able to file the report of the referee and enter up judgment, because there were other defendants upon the record who had not submitted to the reference, and who had not appeared in the cause, and because the report did not show the exact sum due—gave notice of an application to the court, at special term, for the relief demanded in the complaint. The defendants did not appear, to oppose the motion, and the court made an order referring it to a referee to compute the amount due. Upon the report of the referee, showing the amount due as against all the defendants, the plaintiff, on a notice of ten days, brought the cause to a hearing, and obtained a final judgment for foreclosure and sale. *Held*, that this practice was entirely regular. *Hill v. McReynolds*, 488

### N

#### NATURALIZATION OF ALIENS.

*See* COUNTY COURT.

#### NEW ASSIGNMENT.

*See* TRESPASS.

#### NEWLY DISCOVERED EVIDENCE.

*See* JUDGMENT, 16, 17, 18.

### O

#### OFFICE AND OFFICER.

1. Where an individual claims, by action, a public office, or the incidents to the office, he can only recover upon proof of title. The salary and fees of an office are incident to the title, and not to the usurpation and colorable possession of the office. *The People ex rel. Morton v. Tisman*, 198
2. Possession under color of right, though it may serve as a shield for defense, cannot, as against the public, be converted into a weapon of attack, to secure the fruits of the

usurpation and the incidents of the office. *ib*

3. At common law, a public officer, appointed or chosen for a specified term, cannot hold over, beyond that term, upon the failure of the proper body to appoint or elect a successor. *ib*

4. Provision is made by the laws of this state for all the cases in which persons in office can hold over, beyond the times for which they were appointed or chosen. But there is no provision of law authorizing the incumbent of the office of city inspector of New York to hold over, after the expiration of his term, and until his successor is appointed. *ib*

5. Accordingly, where the relator, prior to the passage of the act of 1857, amending the city charter, was elected to the office of city inspector, for the term of three years, which term was to expire on the 31st of December, 1858; it was *held* that by virtue of the act of 1857, which expressly limited his term of office to the time for which he was elected, and repealed the act under which he took office, the relator's authority as city inspector ceased on the 31st of December, 1858; and that consequently he could not, by mandamus, compel the mayor to countersign the warrant of the comptroller, for his salary, during the months of January and February 1859. *ib*

## P

### PARTNERSHIP.

1. After the death of one of several partners, no action will lie against his personal representatives, for the recovery of a partnership debt, while the surviving partner is alive; until the inability of the latter to pay the debt has been legally ascertained, or clearly shown. *Tracy v. Suydam*, 110

2. Two partners cannot bind a third by an agreement for the dissolution of the partnership, and the repayment of the funds advanced by one of the two, to which agreement the third partner is not a party. *Gansevoort v. Kennedy*, 279

3. The fact that a promise to refund moneys advanced for the firm, is made by one of the partners to another after the latter has withdrawn from the firm, does not affect the principle. *ib*

4. Where a partnership is not to continue for any definite length of time, either of the partners has a right to withdraw, and thus dissolve the partnership, at any time he pleases. And whenever one does so, his rights become fixed by law. *ib*

5. He is liable to contribute his share, to all losses, and cannot take out the moneys he has put into the business until after the account of profits and losses has been adjusted and settled, and the debts of the copartnership have been provided for. This each partner has the right to insist upon; and an agreement of two of the partners, to the contrary, will not bind a third who is not a party to the agreement. *ib*

### PEOPLE OF THE STATE.

*See EJECTMENT*, 1, 2, 3

### PLEDGE.

1. Where stock is pledged as security, for the payment of a note, the pledgor's equitable action to redeem the stock accrues or commences when the note becomes due; and if such action is not brought within ten years from that time, it will be barred by the statute of limitations. *Roberts v. Sykes*, 173

2. Such a case comes within the section of the revised statutes relative to bills for relief, in cases of trusts not cognizable at law, &c. (2 R. S. 801, § 52.) *ib*

3. The court will not, for the purpose of relieving a pledgor from the statute of limitations, assume, in the absence of any allegation or proof on the subject, that there was an agreement between the parties, that the pledgee should keep the stock until he should have repaid himself out of the dividends and proceeds. *ib*

4. The *legal* remedy of a pledgor, by trover or otherwise, is limited to six years after the maturity of the note, for the payment of which the property is pledged, *it seems.* *ib*

## PRACTICAL LOCATION.

*See* FENCES.

## PRACTICE.

1. Where there is but one exception to the refusal of the judge to charge as requested, the party excepting must, in order to sustain the exception, show that every proposition embraced in the request to charge is tenable. If either proposition is erroneous, the exception falls, although a portion of them were sound in point of law. *Mages v. Badger*, 246
2. Where, in an action against a corporation, as indorser of a promissory note, there was conflicting evidence upon the questions whether the indorsement was for the accommodation of a third party, or whether the note was discounted by the plaintiff for the benefit of the defendant; and if it was an accommodation indorsement, whether the note was discounted by the plaintiff in consequence of representations made by the proper officers of the defendant that it was their own note, received by them in the ordinary course of business; *Held*, that those questions should have been submitted to the jury; and that it was erroneous for the judge himself to decide that the plaintiff discounted the note so as to become a *bona fide* holder, and to direct the jury to find a verdict for the plaintiff. *Bridgeport City Bank v. Empire Stone Dressing Co.*, 421

*See* MORTGAGE, 5.

## PRINCIPAL AND AGENT.

1. An agent, employed to examine and ascertain how much and what part of the lands of his principal can be sold without inconvenience, and to set off by metes and bounds such portions as he in his judgment shall deem advisable, and to report

his proceedings to his principal, cannot, after examining the property and recommending a sale of a portion thereof, purchase the property himself, and take a conveyance thereof for his own benefit. *Cumberland Coal and Iron Co. v. Sherman*, 558

2. And if such agent, after so purchasing the property, organizes a company in which he becomes a director and a large stockholder, and transfers and conveys the land, and assigns a contract relating to it to such company, the company will be charged with notice of the facts and circumstances attending the purchase by its grantor, and will stand in no better position than he occupies. *ib*
3. Under such circumstances, the principal is entitled, at his option, to have the sale to its agent vacated and set aside, both as against the agent himself, and those to whom he has conveyed with notice of the facts. *ib*
4. And, as an agent is incapacitated to purchase for himself, so is he also incapacitated to act for another person, in making the purchase. *ib*
5. A director of a corporation is the agent or trustee of the stockholders, and as such has duties to discharge, of a fiduciary nature, towards his principal; and is subject to the obligations and disabilities incidental to that relation. *ib*

*See* CORPORATION, 7, 8.

RAIL ROAD COMPANIES.

## PRINCIPAL AND SURETY.

1. Where one of several sureties takes from his principal a chattel mortgage, to indemnify him for becoming such surety, and afterwards discharges the same without the consent of his co-sureties, he will, by that act, be prevented from calling upon his co-sureties for contribution. *Ramsey v. Lewis*, 408
2. All the sureties have an equitable interest in a security taken by one of their number, for his own indemnity; and to the extent that they are injured by the relinquishment

of such security by him, the fact of such relinquishment is a defense to his claim against them for contribution. *ib*

#### PROMISSORY NOTES.

1. A note given to a corporation, by a stockholder, in payment of a subscription for preferred stock, is valid in the hands of the company, or of a third person to whom it is regularly transferred, in part payment of a demand due him from the company. *Magee v. Badger*, 246
2. A second note, given by such subscriber, in settlement of an action brought to recover the amount due upon the original note, is also valid; it having a good consideration, to the amount due upon the first. *ib*
3. A party giving a note, under such circumstances, would not be permitted to set up as a defense to it, the invalidity of the first note; unless he could show that he was in some way deceived and defrauded in the settlement. *Per JOHNSON, J.* *ib*
4. If the maker is defrauded, and he seeks to repudiate the second note on that ground, he must restore the old note, given up on the settlement, and place the holder in the same situation in which he stood at the time of the settlement. *ib*
5. Where, in an action on a promissory note, the judge charged the jury that if the plaintiff took the note with notice of facts constituting a defense thereto, it would be void in his hands; and further, that if he had knowledge of facts or circumstances which should have prompted further inquiry that might have led to a knowledge of the facts, the note would, for that cause, also, be void; *Held* that the latter clause of the charge went beyond the settled rule of law, in regard to the validity of negotiable paper in the hands of a holder for a valuable consideration. *ib*

*See USURY.*

#### Q

#### QUO WARRANTO.

*See ELECTIONS, 1, 7.*

#### R

#### RACKET RIVER.

*See RIVERS.*

#### RAIL ROAD COMPANIES.

1. Where a contractor, engaged in repairing a bridge upon a rail road for the company, employs men to work thereon by the day, the latter are the servants of the contractor, and not of the company; and between them and the company there is no privity whatever. *Young v. New York Central Rail Road Company*, 229
2. If a man, thus employed by the contractor, receives an injury from a passing train while at work upon the bridge, he may maintain an action for damages against the rail road company; provided he can show that the injury was caused by the negligence of the company's servants or agents in charge of the train, without any fault or negligence on his part. *ib*

#### RECEIVER.

1. A receiver is an officer of the court, and by the well settled practice, permission of the court is necessary, to warrant an action against him. *De Groot v. Jay*, 483
2. This rule is essential for the protection of receivers against unnecessary and oppressive litigation, and should be carefully maintained. *ib*
3. It is a contempt of the court, to sue a receiver without such permission, and the proceedings in an action brought against him without leave may be stayed, or set aside, on motion or petition. *ib*

#### RELIGIOUS SOCIETIES.

*It seems* that the trustees of an incorporated religious society have not the capacity to take property devised or bequeathed to them in trust for other societies. *Wilson v. Lynd*, 124

RIVERS.

1. The doctrine is fully established that in fresh water rivers, where the tide does not rise, except in our large lakes and rivers forming the boundary between us and other states and nations, the ownership of the citizen is of the whole river—the soil and the water—subject to the servitude of the public interest or right of way. *Per JAMES, J. Morgan v. King,* 9
2. The right of public servitude, in a stream, depends not upon its navigability, in the common law sense of the term, but upon its capacity for the purposes of trade, business and commerce. *ib*
3. Any stream, capable of being used in the transportation of any kind of property to market—whether in boats, rafts or single pieces—whether guided by the hand of man, or floated at random on the water, is a public stream, and subject to the public easement. *ib*
4. Adopting that rule as a correct exposition of the common law as understood in this country, and applying it to the facts of this case, the Racket river is, and was always, a public highway. *POTTER, J. dissented.* *ib*

S

SET-OFF.

*See EXECUTORS AND ADMINISTRATORS, 5.*

STATUTES.

1. The governor may approve and sign a bill after the adjournment of the legislature, so as to render the same valid and binding as a law. *The People v. Bowen,* 24
2. The 9th section of the "Act to incorporate the Metropolitan Gas Light Company of the city of New York," passed April 17, 1856, by which it is provided that "the said company shall be deemed to be organized when the president shall be elected, and shall be deemed to be in

practical operation from the time the permission and authority provided for in the first section is obtained," was intended to relieve, and did relieve, the corporation from the provision of the revised statutes requiring corporations to organize and commence the transaction of their business within a year. *ib*

3. Under the act of April 1, 1854, authorizing the Buffalo, Corning and New York Rail Road Company to receive subscriptions for preferred stock and to issue such stock to subscribers therefor, and requiring such subscribers to pay the par value of such shares as they are authorized to take, "in such manner as the board of directors should direct at the time of subscribing," the directors had the power to take from a subscriber his promissory note payable in a year, in payment of his subscription for preferred stock. *Mayee v. Badger,* 248

STEAMBOATS.

1. Where individuals take a steamboat from the general owner, and agree to pay the persons employed in navigating her, and the expenses of running the boat, they are the owners, for the time, and responsible for negligence in her navigation. *Sherman v. Fream,* 478
2. So, if they receive the price of passage, freight, &c. and have the direction and control of the boat. *ib*
3. If they, by their contract, charter the boat generally, they are owners, in respect to liability for negligence in running her. If the contract is one of affreightment, merely, they are not such owners. *ib*
4. Where the owner of a steamboat, which is disabled so that she cannot make her trip, hires another boat in her place, to take her tow, freight and passengers to a designated point, the officers and crew of the latter boat remaining in the exclusive control of her, during that trip, and being paid therefor, by her general owner, the contract is not a contract of affreightment. *ib*
5. If the charterers employ the officers and hands, and are legally responsible to them for their wages,

the charterers have the control of the steamboat, and are liable as owners, &c. in the absence of evidence of some special arrangement securing the boat to others. *ib*

6. In case of a collision, the crew of the injured vessel are not bound to remain on board, unless it is entirely plain that they can do so with safety, and there is good reason to suppose the vessel can be saved. If such circumstances exist, however, leaving the vessel is gross negligence. *ib*

7. Unless such crew grossly err in judgment, in abandoning the injured vessel soon after the collision, the owners of the vessel in fault will not be thereby exonerated from liability for the loss occasioned by the collision. *ib*

#### STARE DECISIS.

The court, in the 1st district, will regard the decision of a general term, in any other district, as controlling, until reversed by the court of appeals; unless, from some special reason appearing, it is clearly erroneous. *Loring v. The United States Vulcanized Gutta Percha Co.*, 644

#### STREAMS.

*See* RIVERS.

#### SUPREME COURT.

*See* STARE DECISIS.

#### SURPRISE.

*See* JUDGMENT, 16, 17, 18.

### T

#### TOWN COLLECTORS.

1. The duty of a town collector to pay to the several officers named in his warrant the sums required to be paid to them respectively, within one week after the first day of February, is the duty which the collector and his sureties, by their bond, undertake shall be performed; and on the failure of the collector to execute

that duty, the condition of the bond is broken, and the liability of the obligors at once attaches. *Looney v. Hughes*, 605

2. For the purpose of enforcing that liability as speedily as practicable, the legislature has provided, *for the public benefit*, a summary mode of proceeding against a collector in default, by the issuing of a warrant within twenty days by the county treasurer, against the property of such collector, directed to the sheriff. *ib*

3. But the issuing of such a warrant, and the return thereof unsatisfied, are not conditions precedent to the right of the supervisor of the town to maintain an action against the sureties, upon the official bond of the collector. *ib*

4. Nor will the omission of the county treasurer to issue his warrant within the time specified in the statute, discharge the sureties from their liability upon the bond. *GREENE, J.* dissented. *ib*

5. The provisions of the statute, relative to the issuing of such warrant, by the county treasurer, being for the public benefit, and not for the benefit of the sureties, are merely *directory*, in respect to the time within which the warrant is to be issued. *ib*

#### TRESPASS.

A new assignment, in an action for a trespass, setting forth more particularly the cause of action relied upon, is not necessary, nor allowable, under the code. *Stewart v. Wallis*, 344

#### TROVER.

1. To sustain an action in the nature of an action of trover, for the wrongful withholding and detention of goods, after demand, the plaintiff must show, affirmatively, the facts requisite to constitute a conversion. *Whitney v. Slauson*, 276
2. He must show a wrongful detention after the demand. A mere neglect, on the part of the defendant, to de-

liver upon demand, unless the goods are then in his possession, does not work a conversion of the property. The remedy, in such a case, is by another action. *ib*

8. The ability of the defendant, to comply with the demand when made, is an essential part of the proof on the part of the plaintiff, to sustain an action for a wrongful conversion. *ib*

4. Goods were purchased by C. of the defendants, and were by the latter boxed up for him, on the 4th of December, 1855. The defendants undertook to ship the goods to the plaintiff, but failed to do so, and there was no evidence to show what became of them after they were boxed up. Demand was made, of the goods, in October, 1856. *Held* that the law would not, under such circumstances, presume that the defendants had them in their possession at the time of the demand. *ib*

#### TRUSTS AND TRUSTEES.

1. The fact that a person appointed executor and trustee, by will, has not qualified as executor, will not disqualify him for the execution of the power of sale, given to him as trustee; *it seems.* *Williams v. Conrad,* 524
2. And so long as the trustee is willing to execute the power, the court will not, in a suit to which he is not a party, appoint another person to execute the power of sale. *ib*
3. Where a deed is made to a trustee, which recites that the trustee has determined to invest \$5000 of the trust property in the lots thereby conveyed, and which conveys the land in trust to and for the purposes of the trust, the admissions and trusts in such deed are to be taken most strongly against the trustee; especially where the admission relates to matters particularly within the knowledge of the party making it. *Jones v. Butler,* 641

#### U

##### USURY.

1. Where payees residing in the country, of promissory notes payable at

a bank in Albany, consent to renew the same, at the request of the maker, on condition that he shall give a new note, payable in Albany, and pay the discount, with one half of one per cent in addition, for the difference of exchange between the two places, which is accordingly done, the transaction is not *usurious.* *JOHNSON, J. dissented.* *Price v. The Lyons Bank,* 85

2. The fact that the renewal note is made payable at an Albany bank—even if it was the intention of the parties to secure to the payees more than legal interest—will not affect the law of the case; it being lawful to exact the actual difference of exchange on the amount of the note, whatever was the intention in making the exaction. *ib*
8. Accommodation indorsers of a promissory note made by a corporation are not estopped by the "Act to prohibit corporations from interposing the defense of usury in any action," passed April 6, 1860, from alleging usury, as a defense to an action brought against them and the corporation jointly, upon the note. *Praatt, J. dissented.* *Hungerford's Bank v. Dodge,* 626
4. Such indorsers are in no sense strangers to the contract of loan, so as to preclude them from setting up the defense of usury when sued upon their indorsement, or from seeking affirmative relief by action, on the ground of usury. *ib*
5. They are sureties of the borrower, and as such are embraced in the term "borrower," as used in the 8th section of the revised statutes relating to usury, and in the 4th section of the usury law of 1837. *ib*

#### V

##### VENDOR AND PURCHASER.

Where a vendor, in pursuance of a right reserved in the contract of sale, declares the contract void, and re-enters and takes possession of the lands, and sells the same to another person, this amounts to a rescission of the contract by him, and the vendee may, in an action for money had

and received, recover back the payments made by him. *Utter v. Stuart*, 20

See ACTION, 2.  
AGREEMENT, 2.

### VILLAGE COLLECTOR.

- 1 A bond, executed by the collector of an incorporated village, and his sureties, to the village, by its corporate name, after naming the obligors, and describing them as inhabitants of the village, declared that they were "held and firmly bound in the penal sum of eight hundred dollars, to be paid to the trustees or their successors in office." In the recital, preceding the condition, it was stated that P., one of the obligors, had been chosen collector of said village; and the bond was conditioned for the faithful performance of his duties as such collector. Held that the bond, although not *in terms* executed to the village by its corporate name, was a substantial compliance with the provisions of the statute, so far as related to the obligees therein, and was valid and obligatory upon the parties thereto. *Village of Warren v. Phillips*, 646
2. As soon as a bond, executed by a village collector and his sureties, is accepted by the trustees of the village, it becomes a valid and obligatory instrument; although the approval of such bond is manifested only by a resolution, passed by the trustees. *ib*
3. The provision in the statute, for the indorsement of a certificate upon the bond, by the trustees, showing their approval of the sureties, is merely directory; and the omission of such certificate will not affect the instrument itself, or its validity. *ib*
4. Although no express authority be given to a village corporation, by its act of incorporation, for the prosecution of suits for debts and other demands, it may, under the general powers conferred upon all corporations, sue upon a bond given to the corporation by the village collector; and this, without waiting until a warrant has been issued by the

county treasurer, pursuant to the statute, (1 R. S. 400, § 13,) for the collection of the unpaid tax out of the collector's individual property, and has been returned unsatisfied. *ib*

5. That provision relates only to warrants issued to collectors of taxes, by the board of supervisors; and does not apply to collectors of city or village taxes, except in special cases where it is made applicable. *ib*

## W

### WESTERN RAIL ROAD CORPORATION.

1. By the act of the legislature, passed in 1840, (*Laws of 1840, p. 80*), granting authority to the Albany and West Stockbridge Rail Road Company to construct one or more *deposits* in the city of Albany, and to connect the same with its rail road by a single or double track; and thus, in effect, empowering the company to extend its road from Greenbush to Albany, the rail road company has the right to carry passengers from Albany to Greenbush, as well as over any other portion of its road. *Akin v. The Western Rail Road Corporation*, 306
2. There is nothing in that act, or in the agreement subsequently made between the corporation of Albany of the first part, the Albany and West Stockbridge Rail Road Company of the second part, and the Western Rail Road Corporation of the third part, bearing date April 23, 1840, which prohibits the Western Rail Road Corporation from carrying passengers from Albany to Greenbush, any more than from Albany to any other station on the line of the road. *ib*
3. The carrying of passengers across the river, between Albany and Greenbush, by the Western Rail Road Corporation, upon ferry boats, free of charge, is not a violation of the rights conferred upon B. Akin and S. Schuyler, by a grant to them from the corporation of Albany, made on the 1st of October, 1852,

of the exclusive right of ferriage between Albany and Greenbush, for the term of twelve years.   **ib**

WILL.

1. *Competency of testator.*

1. Where the court is satisfied that, though a testator's capacity was slender, he yet had a disposing mind, if the evidence is sufficient to show that he fully understood, and intended to make, the disposition which he has made of his property, the will must stand, however unnatural and unjust may be its provisions. *Van Pelt v. Van Pelt*, 134

2. Where the testator is unable to read or write, is extremely ignorant, is weak in understanding, and is susceptible to influence, or the victim of passion or prejudice, a simple compliance with the statutory forms of execution will not be sufficient to render the will valid.   **ib**

3. The burthen of proof is shifted in such a case. The party propounding the will is bound to show, not only that the formal acts required by the statute, in all cases, were performed, but that the testator's mind accompanied the will; that he knew what he was executing, and was cognizant of the provisions of the testament.   **ib**

4. If there is not sufficient evidence to establish the fact that the will was carefully read over to the testator, and that he fully understood its contents, a feigned issue may be awarded to try that question and other questions arising upon the application to the surrogate for probate of the will.   **ib**

2. *Construction and validity.*

5. A testatrix, by her will made in 1845, directed that upon the death of her mother, the value of her lot fronting on C. street in the village of H. should be estimated as land only, irrespective of any improvements which should be made thereon, and that the amount so estimated should be paid by her executors out of the produce of her real or personal estate to the trustees of the

Baptist church in Oliver street, in the city of N. Y., to be by them put out at interest until, with the additions which should be made by subscriptions or otherwise, a sufficient sum should accumulate to enable the trustees of that church to erect in the said village of H. a church or place of worship for christians of the Baptist denomination. The will contained a general power to the executors, as trustees, to sell and dispose of all the real and personal estate of the testatrix, and directed them to divide the proceeds, after the payment of her debts and the performance of the trusts mentioned in the will, to her brothers and sister, and the children of a deceased brother. After the making of the will, the testatrix sold the lot on C. street for \$250. The value of the lot subsequently increased, so that at the death of her mother, in 1856, it amounted to from \$1000 to \$1500, irrespective of any improvements made after the date of the will. The acting executor had in his hands about \$700, being what remained of the personal estate of the testatrix, after payment of debts, &c. and all her bequests, except those to the Baptist church and the residuary legatees. He had sold the real estate to the defendant L. for \$2600, who was willing to take a conveyance and pay the purchase money, if the court should determine that the executor had power to sell and convey the land, so as to give a good title. After the date of the will, and during the lifetime of the testatrix, a church was erected by the Baptists in H., sufficient to accommodate all of that denomination residing in that vicinity, to which the testatrix contributed \$50. *Held*, 1. That under the provisions of the revised statutes relative to accumulations (1 R. S. 773, 774, § 8) and the decision of the court of appeals in *Williams v. Williams*, (4 *Selden*, 525,) making those provisions applicable to bequests to religious societies, the direction for an accumulation for the erection of a church at H. was inoperative and void. 2. That donations to incorporated religious societies are exempt from the provisions of the revised statutes to prevent perpetuities. 3. That the legacy to the Baptist church in Oliver street could not be

sustained, either as a contribution towards building another church, or to defray the expenses of the edifice which was erected during the lifetime of the testatrix; inasmuch as the bequest could not be effectuated without violating the provisions of the revised statutes against accumulations, and because the proposed object had been accomplished through other means, in the lifetime of the testatrix. 4. That although the legacy to the Baptist church was void, the power given to the executors to sell the real estate of the testatrix was valid; and that L. must complete his purchase. *Wilson v. Lynt*, 124

6. A testator, by the 2d clause of his will, devised a part of his homestead farm to his three grandchildren, Erastus, Mary E. and John Hover, share and share alike, but subject to the payment of debts and legacies, and to the conditions thereafter stated. These conditions were, that they, being minors, were not to *take said estate* until they should severally arrive at the age of twenty-one years; with a further provision that in case of the death of either before that age and without issue, the survivors or survivor should take such share; and in case of the death of all, under age and without issue, it should go to the testator's son John in fee. The testator then directed that during the minority of the grandchildren his son John should *take charge* of, and have the *management* of the said estate, and out of the *avails* should *support* the grandchildren and their mother; and he appointed his son John their *guardian*, and as such guardian he was to *have charge* of their estate. Out of the surplus of the avails of the estate, over and above such support, (if any,) his son John was directed to pay the debts and legacies charged thereon; and, after doing so, to invest at interest any surplus that might remain, for the use and benefit of the grandchildren, to be paid over to them at the age of twenty-one. He was not to be made liable or accountable for losses in the *management* of the estate, unless for gross neglect, &c. The testator also directed that so long as Mary H., the mother of his said grandchildren, and the widow of his

deceased son Peter, should remain the widow of his son, she should remain in the testator's mansion house and superintend the household affairs, and be supported out of the avails of the property devised to the grandchildren. *Held* 1. That the intent of the testator, as appearing from the terms of the devise, was as follows: 1. A devise of the real estate to the three grandchildren, in fee, to take effect in possession on their arriving at the age of twenty-one years. 2. In case either of them should die before the age of twenty-one and without issue, a devise over to the survivors, and if they should all die, to the testator's son John, in fee. 3. A devise of the fee in trust, by implication of law, to John, during the minorities of the grandchildren, and until the youngest grandchild should arrive at the age of twenty-one years. 2. That the trust or direction to the testator's son John to manage and control the estate, and receive and apply the avails thereof, during the minorities of the grandchildren, was *void*, as involving, necessarily, a suspension of the power of alienation during the minorities of the *three* grandchildren. And that the trust was not saved, as a valid trust, by the provisions of section 55 of 1 R. S. 728. 3. That the whole devise, including the illegal trust, was not so closely interwoven, in its several parts, but that the valid could be detached from the void provisions, and preserved, without doing violence to the testator's intentions. 4. That the main devise to the infant grandchildren and to the testator's son John, was valid; and that the same took effect during the respective minorities of the grandchildren, as well as afterwards. And that the estate vested in the grandchildren immediately on the death of the testator, subject to be divested or determined by their death under age and without issue. 5. That the provision for the residence of the mother of the infant devisees in the mansion house of the testator, and for her support out of the avails of the estate, during her widowhood, was valid. 6. That during the minorities of the grandchildren the estate descended to the infant devisees of the testator, subject to the charges named in the will, including the charge for the

- residence and support of the widow.  
 7. That in all other respects the provisions of the will were valid, and capable of being enforced. *Post v. Stover*, 812
7. The courts have latterly leaned more and more to the preservation of such parts of a will as may be separated from the rest without a disruption of the whole. *Per HOGGBOOM, J.* 5b
8. It is a well established rule that where the devises are distinct, or one part can safely be detached from another, without disturbing the relation or continuity of the whole, it should be done. *Per HOGGBOOM, J.* 5b
9. Notwithstanding the introductory words of a will evince an intent to dispose of all the testator's wordly estate, this is not sufficient to enlarge the estate subsequently devised, into a fee, unless the words of disposition, in the *clause of devise*, are connected, in terms or sense, with the introductory clause, and import more than a mere description of the property. *Van Derzee v. Van Derzee*, 881
10. Where a testator, by his will, executed before the revised statutes took effect, devised a farm to his son Storm, without words of inheritance or perpetuity, *held* that the devisee, under this clause of the will, took only a life estate. 5b
11. *Held also*, that the following clause in the same will, "Further, I make my wife master of one third of my aforesaid estate as long as she remains my widow, and after her marriage or death to be and belong to my aforesaid son Storm," did not have the effect to enlarge the life estate previously given to Storm, into a fee. 5b
12. Where a portion of a farm devised had been held, possessed and claimed by the testator since 1769, and the residue since 1790, and was so held and claimed by his successors, after his death, as under a lease in fee from one V. R., and rent had always been paid for the entire portion in that character, and such a title had been uniformly recognized by V. R., the landlord, *held*, that the interest of the tenant or lessee in fee, as such, had been held and claimed adversely, which made a perfect title by adverse possession; and that the title and claim and possession of the tenant and his heirs thus derived and held, having been uniform, unbroken and perfect for so long a period down to the present time, the landlord could never dispossess them so long as they complied with the terms of the lease, or the conditions of the tenancy. 5b
13. Accordingly *held*, that the testator had an interest in the farm, which could pass by the terms of his will. 5b
14. A testator, by the first clause of his will, gave and bequeathed to various relatives legacies amounting in the whole to \$11,000; and he directed that such legacies be paid in such order, and by such installments, or otherwise, as his executors might deem most for the interest of his estate, and that they should pay interest thereon from the time of his death, half-yearly, until they should be paid. He then gave and bequeathed to M. M. \$250 in quarterly payments, for life; and to the Roman Catholic Orphan Asylum, in the city of New York, \$100 a year, until the lapse of 21 years from the time of the testator's death, or until the death of the survivor of his two youngest children living at the time of his death. And he directed his executors to apply, at their discretion, \$50 a year to the relief of the poor of St. Mary's church, in Grand street, New York, until the lapse of 21 years from his death, or until the death of the survivor of his two youngest children. The last three legacies and annuities were to be a charge on the testator's leasehold property No. 197 Chatham street. By the seventh clause, in case he should leave more than one child him surviving, the testator divided the rest, residue and remainder of his estate, real and personal, into so many equal shares as there were children, and he gave one of said shares, as applicable to each child, to his executors and the survivors and survivor of them, his heirs and assigns for ever, *in trust* for the benefit of such children and their issue. The testator left him surviv-

ing two children. His personal estate was not sufficient, after the payment of his debts, to pay in full the legacies given by the will. *Held*, 1. That the whole frame and scheme of the will plainly showed that the testator intended the legacies to be paid absolutely, and at all events; and that they were a charge upon the whole real estate of the testator; and if necessary his real estate, other than the leasehold interest in 197 Chatham street, must contribute to the full payment thereof. 2. That the legacies must be paid, in full, before the residue and remainder could be held and applied upon the trusts and to the uses declared in the seventh clause, &c. 3. That the direction to the executors to apply at their discretion \$50 a year to the relief of the poor of St. Mary's church was valid, and could be enforced. *McLoughlin v. McLoughlin*, 458

15. A testator, by his will, gave and devised to his wife J. all his estate, real and personal, so long as she remained his widow; making no disposition of the estate in remainder, which accordingly descended to C. his heir at law. The personal estate proving insufficient to pay the debts, J. the executrix applied to the surrogate for authority to mortgage, lease or sell the real estate of the testator, for that purpose, and that she be allowed to sell, in the first instance, the reversionary interest of C. therein. The petitioner claimed that the estate in remainder should be first sold, and the proceeds applied to the satisfaction of the debts; or that the value of her life estate in the premises should be computed and ascertained upon the principles applicable to annuities, and deducted from the proceeds of the sale, and the residue applied to the satisfaction of the debts, before any part of the ascertained value of the petitioner's life estate should be appropriated to that object. The surrogate made a decree authorizing a sale of the land, and directed that the proceeds be applied to the payment of the debts; taking no notice of, and giving no preference to, the estate of J. as tenant for life, over that of C. in remainder. *Held* that the rule of distribution contended for by J. was inconsistent with the

directions of the statute; and that the decree of the surrogate was right. *Pelletreau v. Smith*, 494

16. A testator, by his will, directed that all his real and personal estate should remain as it was at the time of his death, for the exclusive use of his wife and children who were under age and unmarried, and should be so managed by his executors as would accomplish two objects; first, the comfortable maintenance of his wife; and second, the comfortable maintenance of his children; that nothing consisting of the character of personal estate should be sold, unless under the greatest necessity, and then under the immediate direction of the executors; that the property, both real and personal, should be so kept, and the income so used, as might best subserve the objects above stated, as long as the testator's wife lived; and after her death the whole of his estate should be so occupied for the benefit of his children who were under age and unmarried, as might best promote the objects above mentioned; that after the children were of full age, and after the death of the wife, all the property should be sold, and the proceeds divided among the children, as the law directs. That if the widow should marry again she should have no right or claim to the estate, and should cease to be executrix, and be "cut off" from every portion of his estate. A legacy of \$500 was given S. Conrad, to be paid to him after the death of the testator's wife, and after the testator's children should be of full age, "out of the moneys so realized out of the sale of my estate." There was no direct devise to the executors, nor any express trust, in words, created, in them. *Held*, 1. That after the payment of his debts, &c. the testator intended that all his property, real and personal, should remain and be kept undisposed of for the use of his wife and his children under age and unmarried, during the life of his wife, or until she should marry again. 2. That the testator also intended that all his property should be kept, and remain undisposed of, after the marriage or death of his widow, for the use of such of his children as should then be under age and unmarried.

3. That the testator intended his wife should use and receive, and apply, the rents and income of all the property to the support and maintenance of herself and children under age and unmarried, during her life, or until she married again; which was substantially a devise and bequest of all his property, real and personal, to her for such term, for that use and purpose. 4. That so far as such devise and bequest to the wife were for the benefit of the children under age and unmarried, they involved an express trust, which made her term inalienable during the minority of the unmarried children, or of an unmarried child; but that as such inalienability could not continue longer than her life, such devise, and bequest, and trust, was lawful and valid. 5. That the further trust after the death or marriage of the widow was not valid, as it might have suspended the absolute power of alienation, for a longer period than during the continuance of two lives. But that the invalidity of that trust did not affect the validity of the devise and bequest to the widow; and there was, therefore, by the will, a good and valid devise and bequest to the widow, for life. 6. That all the property, or the proceeds of its sale, should be divided or distributed, and the rights of all the parties declared, upon the theory that the will made no disposition of the property after the death of the widow, and that the same should be treated, and be divided and distributed among the heirs and next of kin of the testator, or those who had succeeded to their interest by purchase or otherwise, as an undisposed of reversion. 7. That the real estate of which the testator died seised vested, on his death, in all his surviving children, as his only heirs at law, subject to the devise thereof to his wife for the use of herself and of the children under age and unmarried, and subject to the implied power given to the surviving executor to sell, &c.; and that the rights and interests of all the parties claiming, by descent, purchase or otherwise, must be declared, and the proceeds of the sale, after the payment of the \$500 legacy, must be distributed, upon the theory that it was so vested. 8. That the legacy of \$500 to S. Conrad was vested, not

contingent; that it did not lapse by the death of the legatee before the death of the widow; and that it must be paid out of the proceeds of the property, to the personal representatives of S. Conrad, &c., and the remainder of the proceeds must be distributed among the heirs and next of kin of the testator, and those claiming and entitled under and through them. 9. That there was no ground upon which the real estate could be considered as converted into money, from the death of the testator. *Williams v. Conrad*, 524

17. A testator, by his will, directed his executors to retain and invest, and keep invested from time to time, one sixth part of his estate, upon real estate security, or in stocks, and to apply and pay over the income thereof, to his wife, during her life. A portion of the trust fund was invested by the trustee appointed in the place of the executor, in the capital stock of the National Bank. The charter of the bank expired January 1, 1857, and the bank reorganized under the general banking law. Preparatory to the reorganization, the bank made and declared a dividend, over and above the par value of the stock, of 18 per cent; leaving it to the option of the stockholders to take stock in the new bank, adding the said dividend of 18 per cent, or to take the same in money. The trustee elected, instead of money, to receive the dividend in the new stock, and received the same, and held the certificates therefor. *Held*, that the testator intended all the income of the property which he ordered to be converted should be paid to his wife, but that the capital so invested should be preserved. *Simpson v. Moore*, 637

18. *Held also*, that under the case of *Clarkson v. Clarkson*, (18 *Barbour*, 646,) the payment of the 18 per cent by the bank must be considered as a dividend; but as it contained part of what was held as capital, when the stock was purchased, so much thereof as was necessary to make up the original investment, over and above the par value of the stock taken by the trustee in exchange, should be retained by him; and that the residue belonged to the plaintiff. 63

3. *Extrinsic evidence when admissible.*

19. Where the language employed in a will is obscure or ambiguous, and words are made use of, in one connection, with a meaning apparently at variance with the sense of the same words in another clause, extrinsic circumstances may be resorted to, for the purpose of aiding the court in arriving at the intention of the testator. *Terpening v. Skinner*, 378

20. Among these extrinsic circumstances, the situation of the testator's property, and the condition of his family, and especially of the apparent beneficiaries of his will, are to be considered, and are prominent land-marks to guide the courts in the duty of interpretation. *ib*

21. Where a will was inartificially and clumsily drawn; was prepared by a very unpracticed scrivener, who was poorly versed in the use of language as a medium of conveying ideas; several of its provisions were directly contradictory to each other; it did not, from the manner of its construction, appear to have been the result of much preconsideration; there was a great indefiniteness and uncertainty in the use of the word "heirs;" and there were other incongruities in the will, which tended to obscure its meaning; *Held*, that it was a proper case for resorting to evidence of the extrinsic and surrounding circumstances of the parties, to aid the court in the construction of the will. *ib*

## WITNESS.

1. Where, on the trial of an action, a person offered as a witness for the defendant, was objected to and rejected, on the ground that the defendant had signed the notes, on which the action was brought, as surety for the witness' wife, who was not joined in the suit; *Held*, that the witness offered was a competent witness for the defendant, notwithstanding his relation to the principal debtor; though he would not have been competent had she been a party. *Deck v. Johnson*, 288
2. Where a defendant makes himself a

witness, in his own behalf, under the 399th section of the code, his credibility is not certified by the plaintiff, but is to be weighed in the same manner, and his testimony submitted to the same tests, as that of other witnesses. And if his testimony and that of the plaintiff (or his assignor) are conflicting, the one testifying to one state of facts, and the other contradicting him—it is the duty of the referee, in deciding upon the facts, to pass upon the comparative credit of the two witnesses. And the judgment will not be reversed—in the absence of any controlling or influential circumstances in favor of one of the other—because he has given credit to one, rather than to the other. *Forward v. Harris*, 338

3. Under the code, husband and wife are competent witnesses in their own behalf, when co-plaintiffs or co-defendants; and in like cases they are also competent witnesses for each other. *ROSEKRAUS, J. dissented. Marsh v. Potter*, 506
4. In actions between one of them and a third person, the one is not a competent witness for or against the other. *ib*
5. The former law is untouched by the code, as respects confidential communications or matters between them. *ib*

## WORK AND LABOR.

1. Where a party sues for work and labor done and performed, if there is a special contract between him and the defendant, not completed or executed as to its terms, the plaintiff should state it, or refer to it, in his complaint. If he fails to do so, the defendant may set it up and urge it in his defense. *Atkinson v. Collins*, 490
2. If, in an action for work and labor, generally, it appears that there was a special contract, which has not been completed or executed, the plaintiff cannot recover for the work comprised within the special agreement. *ib*
3. In such a case, the plaintiff should set out the special agreement, and allege a partial performance. *ib*





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